CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 AUGUST 13, 1997 NO. 33

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 97–66)

CUSTOMS ACCREDITATION OF SGS CONTROL SERVICES, INC. AS AN ACCREDITED COMMERCIAL LABORATORY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of accreditation of SGS Control Services, Inc. as a commercial laboratory.

SUMMARY: SGS Control Services, Inc. of Deer Park, Texas, has applied to U.S. Customs for accreditation for composition and identity of organic chemicals under Part 151.13 of the Customs Regulations (19 CFR 151.13) at their Wilmington, North Carolina facility. Customs has determined that this office meets all of the requirements for accreditation as a commercial laboratory. Therefore, in accordance with Part 151.13(f) of the Customs Regulations, SGS Control Services, Inc., Wilmington, North Carolina, is accredited to perform analysis on the products named above.

LOCATION: SGS Control Services, Inc. accredited site is located at: 111 Cowan Street, Wilmington, North Carolina, 28402.

EFFECTIVE DATE: July 23, 1997.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Senior Science Officer, Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, D.C. 20229 at (202) 927–1060.

Dated: July 24, 1997.

GEORGE D. HEAVEY,
Director,
Laboratories and Scientific Services.

[Published in the Federal Register, July 31, 1997 (62 FR 41132)]

(T.D. 97–67)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), the following Customs broker licenses are canceled with prejudice.

Port	*Individual*	*License #*
New York	Joseph Francis Jacovina	3294
New York	Wood, Niebuhr & Co., Inc.	4814

Dated: July 28, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, July 31, 1997 (62 FR 41133)]

(T.D. 97–68)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.51 and 111.74 of the Customs Regulations, as amended (19 CFR 111.51 and 111.74), canceled the following Customs broker licenses without prejudice.

Port	*Individual*	*License #*
New York	Stephen M. Winsch	10229
New York	Devin M. Diran	9287
New York	Michael Titone	9422
New York	Thomas M. McGrath	9677
New York	Nehls & O'Connell	3943
New York	Francis X. Coughlin, Jr.	4087
New York	F.X. Coughlin Co., Inc.	7171
New York	Robert A. Leslie	5274
New York	Lo Curto & Funk Inc.,	9914
New York	Trans-Marine System, Inc.	3745
Seattle	Scott D. Ogden	7404
Seattle	Austen D. Hemion	2525
Houston	R.W. Smith	1803

Dated: July 28, 1997

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, July 31, 1997 (62 FR 41133)]

U.S. Customs Service

General Notices

QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts and refunds of Customs duties. For the quarter beginning July 1, 1997, the rates will be 8 percent for overpayments and 9 percent for underpayments. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: July 1, 1997.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298–1200, extension 1349.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85–93, published in the Federal Register on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Interest rates are determined based on the short-term Federal rate. The interest rate that Treasury pays on overpayments will be the short-term Federal rate plus two percentage points. The interest rate paid to the Treasury for underpayments will be the short-term Federal rate plus three percentage points. The rates will be rounded to the nearest full percentage.

The interest rates are determined by the Internal Revenue Service on behalf of the Secretary of the Treasury based on the average market yield on outstanding marketable obligations of the U.S. with remaining periods to maturity of 3 years or less, and fluctuate quarterly. The rates

effective for a quarter are determined during the first-month period of the previous quarter. The rates of interest for the fourth quarter of fiscal year (FY) 1997 (the period of July 1—September 30, 1997) will be 8 percent for overpayments and 9 percent for underpayments. These rates will remain in effect through September 30, 1997, and are subject to change for the first quarter of FY–1998 (the period of October 1—December 31, 1997).

Dated: July 28, 1997.

GEORGE J. WEISE,
Commissioner of Customs.

[Published in the Federal Register, August 1, 1997 (62 FR 41482)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 29, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF COTTON CAPS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of cotton caps. Comments are invited with respect to the correctness of the proposed ruling.

DATE: Comments must be received on or before September 12, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW. (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., NW., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Office of Regulations and Rulings, Textile Branch, (202) 482–6976.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Moderniza-

tion), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the classification of cotton caps. Comments are invited with respect to the correctness of the proposed ruling.

In Boston District Ruling Letter (DD) 814497, dated September 27, 1995, Customs classified three styles of caps in subheading 6505.90.2590, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), textile category 859, which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed * * *: Other: Of cotton, flax or both: Not knitted: Other, Other." DD 814497 is set forth as Attachment "A" to this document.

It is Customs position that, since the articles are composed of 100 percent cotton, they are more specifically provided for in subheading 6505.90.2060, HTSUSA, textile category 359, the provision for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other." The proposed ruling revoking DD 814497 is set forth as Attachment "B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 24, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Boston, MA, September 27, 1995.
CLA–2–65–DD:C:D: 101
Category: Classification
Tariff No. 6505.90.2590

MS. MARY C. HUNTER
IMPORT PRODUCTION STATUS ADMINISTRATOR
WOOLRICH, INC.
Woolrich, PA 17779

Re: The classification of cotton caps from China, Hong Kong and Macau.

DEAR MS. HUNTER:

In your letter dated August 31, 1995, you requested a tariff classification ruling.

Style number 280 is a 100% cotton twill woven cap. The cap features a six panel crown with four grommets and a single button at the center, "Lake Wilderness" embroidery in the front, a visor and a plastic adjustable tab in the rear.

Style number 281 is a 100% cotton twill woven cap. The cap features a six panel crown with four grommets and a single button at the center, a Woolrich Logo patch in the front, a visor and a plastic adjustable tab in the rear.

Style number 282 is a 100% cotton twill woven cap. The cap features a six panel crown with four grommets and a single button at the center, "Flashing Rod" embroidery in the front, a visor and a plastic adjustable tab in the rear.

The applicable subheading for the caps will be 6505.90.2590, Harmonized Tariff Schedule of the United States (HTS), which provides for hats and other headgear * * * whether or not lined or trimmed: Of cotton, flax or both: Not knitted: Other: Other. The rate of duty will be 8 percent *ad valorem*.

The caps fall within textile category designation 859. As a product of Macau this merchandise is subject to visa requirements. As a product of China and Hong Kong this merchandise is subject to visa requirements and quota restraints based upon international textile trade agreements.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota restraints applicable to the subject merchandise may be affected since part categories are subject to frequent changes. To obtain the most current information available, we suggest that you check close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling should be attached to the entry documents at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JAMES V. MCLAUGHLIN,
Acting District Director.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:TE 958958 GGD
Category: Classification
Tariff No. 6505.90.2060

MS. MARY C. HUNTER
IMPORT PRODUCTION STATUS ADMINISTRATOR
WOOLRICH, INCORPORATED
Woolrich, PA 17779

Re: Revocation of Boston District Ruling Letter (DD) 814497; cotton twill woven caps; headwear of cotton.

DEAR MS. HUNTER:

In DD 814497, issued September 27, 1995, three separate styles of cotton caps were classified in subheading 6505.90.2590, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), textile category 859, which provides for "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed * * *: Other: Of cotton, flax or both: Not knitted: Other, Other." We have reviewed that ruling and have found it to be partially in error. Therefore, this ruling revokes DD 814497.

Facts:

At the time DD 814497 was issued, the samples, identified by style numbers 280, 281, and 282, were each described as a 100 percent cotton twill woven cap featuring a six panel crown with four grommets and a single button at the center. Each cap had a visor and a plastic adjustable tab in the rear. Style nos. 280 and 282 featured embroidery in the front which

stated "Lake Wilderness" and "Flashing Rod," respectively. Style no. 281 featured a patch in front which bore a Woolrich logo.

Issue:

In what subheading are the cotton caps properly classified?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Heading 6505, HTSUS, applies to "Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed * * *." The EN to heading 6505 indicate that the heading covers hats, whether or not trimmed (with the trimmings of any material), peaked caps of various kinds (uniform caps, etc.), and headgear made up from woven fabric, lace, net fabric, etc. * * * having clearly the character of headgear.

Subheading 6505.90.2060, HTSUSA, textile category 359, provides for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products: **and headwear of cotton,** Other." [emphasis added] Subheading 6505.90.2590, HTSUSA, textile category 859, provides for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: **Other** [than "Certified hand-loomed and folklore products; and headwear of cotton"], Other." [emphasis added] Since the former subheading provides specifically for "headwear of cotton," we find that the three styles of caps, which are composed of 100 percent cotton, are more properly classified in subheading 6505.90.2060, HTSUSA.

Holding:

The three styles of 100 percent cotton twill caps, identified by style numbers 280, 281, and 282, are classified in subheading 6505.90.2060, HTSUSA, textile category 359, the provision for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other." The general column one duty rate is 7.8 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

DD 814497, issued September 27, 1995, is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

REVOCATION OF CUSTOMS RULINGS RELATING TO SUBSTANTIAL TRANSFORMATION OF GOLD CHAIN LINKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letters concerning substantial transformation of gold chain links.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking two rulings pertaining to the assembly (weaving) of gold chain links into chain. Notice of the proposed revocation was published on June 18, 1997, in the CUSTOMS BULLETIN, Volume 31, No. 24/25. No comments were received in response to that publication.

EFFECTIVE DATE: Merchandise entered or withdraw from warehouse for consumption on or after October 13, 1997.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marking Branch (202) 482–6945.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 18, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, No. 24/25, a notice of proposal to revoke Headquarters Ruling Letter (HRL) 556892 dated December 23, 1992, and HRL 556624 dated July 31, 1992, which involved the eligibility of certain jewelry for duty-free treatment under the Generalized System of Preferences (GSP). HRL 556892 held that weaving gold links produced in a GSP country into chain substantially transformed the links into a new and different "product of" the country where the weaving process occurred. As those operations occurred in a non-GSP country, we held in that case that the imported jewelry was not a "product of" the GSP country and was thus ineligible for duty-free treatment under the GSP. In HRL 556624, we found that weaving and soldering operations performed in the non-GSP country resulted in a substantial transformation of the GSP-produced gold links. Therefore, as in HRL 556892, we held that when imported into the United States, the gold jewelry was not a "product of" the GSP country. These decisions were included as attachments to the proposed revocation published in the June 18, 1997 CUSTOMS BULLETIN, supra.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking HRL 556892 and HRL 556624 to reflect

that the simple assembly or weaving of gold links into chain, even when coupled with a soldering operation, does not effect a substantial transformation of the gold links. Therefore, under the facts in HRL 556892 and HRL 556624, the gold jewelry imported from a GSP country will be considered a "product of" that country, for purposes of determining whether it is entitled to duty-free treatment under the GSP. HRL 560333, revoking HRL 556892 and HRL 556624, is set forth as an Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change in practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 24, 1997.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 24, 1997.

MAR–05 RR:TC:SM 560333 BLS
Category:

AREA DIRECTOR
JFK Airport
Jamaica, NY 11430

Re: Eligibility of certain gold jewelry for duty-free treatment under U.S.-Israel FTA; I/A 4/97; substantial transformation; revocation of HRLs 556892 and 556624.

DEAR SIR:

This is in reference to your memorandum dated January 31, 1997, forwarding an internal advice request on behalf of Coloseum Industries Ltd. and Adipaz Ltd. ("Adipaz"), in connection with a claim for duty-free entry of certain jewelry under the United States-Israel Free Trade Area Implementation Act of 1985 ("U.S.-Israel FTA") (General Note 8, Harmonized Tariff Schedule of the United States (HTSUS)).

Facts:

The subject jewelry consists of small link gold chains which undergo processing in Israel and in Zimbabwe. The operations performed are as follows:

Operations in Israel

1. Fine gold bullion is imported into Israel.
2. The bullion is squeezed into one long flat piece of gold.
3. The gold is then shredded into small pieces to fit into the crucible (for melting).
4. The gold is weighed and, together with different alloys, is prepared for melting.
5. The gold and alloys are melted into ingots, which become karat gold.
6. The ingots are rolled in a big rolling mill.
7. Intermediate annealing is done in a controlled-atmosphere furnace.
8. Continuous rolling and annealing (to soften the gold) intermittently are done until a wire with a square cross section of 1.2 mm results.

9. Drawing dyes are inserted on the wire (purpose is to size the wire eventually to the correct gauge).
10. The wire is drawn to the required diameter through dyes (stones).
11. The spool of wire rod is degreased and dried.
12. The gold wire rod is squeezed in a large squeezing machine to create a round wire of gold.
13. The wire is annealed.
14. The gold is squeezed to the final gauge in a small squeezing machine.
15. Further annealing is carried out.
16. Aluminum wire is drawn to the required core diameter.
17. The strip of gold and the aluminum core are inserted into a drawing dye and winding spindle with a spindle winding machine. (This places the aluminum core into the gold.)
18. The resulting spiral is sawed with circular saws into separate links.
19. The separate links are fit between flat cylinders to flatten the links into the final shape.
20. The links are sifted from sawdust remains.
21. The links are shipped to Zimbabwe.

Operations in Zimbabwe

22. The individual links are connected together by hand (assembled) and soldered.

Operations Upon Return to Israel

23. The assembled links are returned to Israel in lengths of 33 cm.
24. The 33 cm lengths are further assembled in Israel by adding ten more links and connecting them together to form continuous lengths.
25. These continuous lengths are cut to the required lengths for either neck chains (minimum 45 cm) or bracelets (approximately 22 cm).
26. The ends are cleaned from the cuttings.
27. End links, quality tag and lock are added.
28. The ends are soldered.
29. The chemical department then cleans the chain by:—Sulfuric acid wash—water rinse—Booming (to strip an outside layer of gold off the chain)—Rinsing—Neutralization of the acids—Polishing in a vibrating tumbler—Rinsing—Drying.
30. The jewelry then goes to Quality Control.
31. The jewelry is exported.

Issue:

1) Whether the gold chains are considered to be a "product of" Israel upon importation into the U.S., for purposes of determining whether the jewelry is eligible for duty-free treatment under the U.S.-Israel FTA.

2) Whether the gold chains are considered to be "imported directly" into the U.S. from Israel.

Law and Analysis:

Under the U.S.-Israel FTA, eligible articles which are the growth, product, or manufacture of Israel and are imported directly to the U.S. from Israel qualify for duty-free treatment or a duty preference, provided the sum of 1) the cost or value of materials produced in Israel, plus 2) the direct costs of processing operations performed in Israel is not less than 35 percent of the appraised value of the article at the time it is entered. *See* General Note 8, Harmonized Tariff Schedule of the United States (HTSUS).

Adipaz contends that the processing in Zimbabwe during which the gold links are assembled (or woven) into chain does not result in a substantial transformation of the Israel-origin gold links. In the alternative, Adipaz argues that upon return to Israel from Zimbabwe, the product is again substantially transformed. Accordingly, Adipaz argues that upon importation into the U.S., the gold jewelry is a "product of" Israel.

"Product Of"

The substantial transformation criteria is used to determine whether an article is a "product of" Israel for purposes of the U.S.-Israel FTA. *See* U.S.-Israel FTA, Annex 3, paragraph 4. A substantial transformation occurs "when an article emerges from a manufacturing process with a new name, character, or use which differs from that of the original material subjected to the process." *See Texas Instruments, Inc. v. United States v. United States*, 69 CCPA 152, 681 F.2d 778 (1982). *See* also U.S.-Israel FTA, Annex 3.

In Headquarters Ruling Letter (HRL) 556892 (December 23, 1992), we addressed the question of whether certain rope-chain jewelry was eligible under the Generalized System of Preferences (GSP) where gold links produced in a GSP country (Thailand) was sent to a non-GSP countries for weaving operations. The woven chains were then returned to Thailand where they were soldered, cut into lengths, clasps attached to make bracelets and/or necklaces, and cleaned and polished. Alternatively, the chains were combined into one continuous length and deaned. In that case, we stated that weaving links into chain forms the fundamental and essential character of the finished article (bracelet and/or necklace) and dedicates its use as jewelry. Therefore, we found that the weaving operation in the non-GSP countries substantially transformed the links into a new and different "product of" the country where that process occurred. Accordingly, we held in that case that the imported jewelry was not a "product of" Thailand and thus was ineligible for duty-free treatment under the GSP. In (HRL) 556624 (July 31, 1992), we addressed a request involving identical operations as in HRL 556892, except that the processing in the non-GSP country also included soldering the links together after the weaving operation.

We have reconsidered our position in HRL's 556624 and 556892, and are of the opinion that the simple assembly or weaving of gold links into chain [even when coupled with soldering] does not effect a substantial transformation of the gold links.

In *National Hand Tool v. United States*, 16 CIT 308, 312 (1992), aff'd, 989 F.2d 1201 (Fed. Cir. 1993), a country of origin marking case, certain hand tool components used to make flex sockets, speeder handles, and flex handles, were imported from Taiwan. The imported components were either cold-formed or hot-forged into their final shape before importation, with the exception of the speeder handle bars, which were reshaped by a power press after importation. In the U.S., the components were subject to heat treatment, which increased the strength of the components, sand-blasting (a cleaning process), and electroplating (enabling the components to resist rust and corrosion). After these processes were complete, the components were assembled into the final products, which were used to loosen and tighten nuts and bolts.

The Court of International Trade decided the issue of substantial transformation based on three criteria, i.e., name, character, and use. Applying these rules, the court found that the name of the components did not change after the post-importation processing, and that the character of the articles similarly remained substantially unchanged after the heat treatment, electroplating and assembly, as this process did not change the form of the components as imported. The court further pointed out that the use of the articles was predetermined at the time of importation, i.e., each component was intended to be incorporated into a particular finished mechanic's hand tool. Based on this test, the court concluded that the processing in the U.S. did not effect a substantial transformation of the foreign hand tool components.

In HRL 559406 (April 25, 1996), Israeli-origin gold jewelry components of various shapes (diamond cut, squares, rectangles etc.) were exported to Thailand where they were assembled into finished gold jewelry. Citing *National Hand Tool*, we found in that case that the character and use of the finished jewelry was predetermined by the form of the exported components. Noting that the jewelry components' character and shape did not change as a result of the assembly and finishing operations performed in Thailand, we found that the processing in that country did not substantially transform the jewelry components into new and different articles, but rather constituted a continuation of the production process leading to their completion as items of gold jewelry. Accordingly, we held that the articles of gold jewelry were considered to be a "product of" Israel for purposes of determining their eligibility for duty-free treatment under the U.S.-Israel FTA.

Consistent with the foregoing, we find in the instant case that the mere assembly and soldering of the Israeli-origin gold links in Zimbabwe to form a chain does not result in a substantial transformation in Zimbabwe. A new and different article having a new name, character or use, has not been created. The assembly operations in Zimbabwe do not alter the fundamental character or specific design of the gold links, nor do they affect the uses to which the links may be put. Both before and after the weaving operation, the links are clearly recognizable as jewelry components and dedicated to be finished into specific types of jewelry, in this case, necklaces or bracelets. The assembly of the links represents a continuation of the production process leading to their completion as finished gold jewelry. (*See Uniroyal Inc. v. United States*, 542 F. Supp. 1026 (1982), aff'd, 702 F.2d 1022 (Fed. Cir. 1983), where the court held that the assembly of the formed uppers to the soles to form a finished moccasin did not result in a substantial transformation of the formed uppers be-

cause the uppers formed the "very essence" of the shoes.) Accordingly, the finished gold jewelry will be considered a "product of" Israel for purposes of the U.S.-Israel FTA.

Imported Directly

Annex 3, paragraph 8, of the U.S.-Israel FTA defines the words "imported directly," as follows:

(a) Direct shipment from Israel to the U.S. without passing through the territory of any intermediate country;

(b) If shipment is through the territory of an intermediate country, the articles in the shipment do not enter into the commerce of any intermediate country while en route to the U.S., and the invoices, bills of lading, and other shipping documents, show the United States as the final destination;

(c) If shipment is through an intermediate country and the invoices and other documentation do not show the U.S. as the final destination, then the articles in the shipment, upon arrival in the U.S., are imported directly only if they:

(i) remain under control of the customs authority in an intermediate country;

(ii) do not enter into the commerce of an intermediate country except for the purpose of a sale other than at retail, provided that the articles are imported as a result of the original commercial transaction between the importer and the producer or the latter's sales agent;

(iii) have not been subjected to operations other than loading and unloading, and other activities necessary to preserve the article in good condition.

The definition of "imported directly" under the U.S.-Israel ITA is very similar to that under the GSP. *See* section 10.175, Customs Regulations (19 CFR 10.175). We have held for purposes of the GSP that merchandise is deemed to have entered the commerce of an intermediate country if manipulated (other than loading or unloading), offered for sale (whether or not a sale actually takes place), or subjected to a title change in the country. See HRL 071575, dated November 20, 1984.

In the instant case, the gold links will be sent to Zimbabwe from Israel for assembly. It is apparent that these operations constitute a manipulation of the merchandise, and accordingly, the merchandise is deemed to have entered the commerce of Zimbabwe. Therefore, the merchandise will be considered to be "imported directly" from Israel only if, upon its return from Zimbabwe, it re-enters the commerce of, and then is directly shipped from, Israel to the U.S.

According to the submission, upon return to Israel, the chains will be subject to further assembly by the addition of ten more links. It will then be cut to length, and will become finished items of jewelry with the addition of end links, locks, and quality tags. The jewelry will then be cleaned and sent to quality control, before exportation to the U.S.

Under these facts, we find that there will be a manipulation of the merchandise in Israel, and thus the gold jewelry is considered to enter the commerce of Israel prior to direct exportation to the U.S. Accordingly, based upon this information, the gold jewelry will be considered to be "imported directly" from Israel into the U.S.

Holding:

1) Israeli-origin gold links exported to Zimbabwe for assembly into gold chain, even when coupled with a soldering operation, do not undergo a substantial transformation as a result of the operations in Zimbabwe. Therefore, for purposes of the U.S.-Israel FTA, the gold chain will be considered a "product of" Israel upon importation into the U.S.

2) The gold chain will enter the commerce of Israel upon return from Zimbabwe. Therefore, the gold jewelry will be considered to be "imported directly" from Israel upon entry into the U.S.

Accordingly, the imported articles will qualify for duty-free treatment under the U.S.-Israel FTA, provided the sum of (a) the cost or value of the materials produced in Israel, plus (b) the direct costs of processing operations performed in Israel is not less than 35 percent of the appraised value of the merchandise at the time of entry. Whether the 35 percent value-content requirement will be met must await actual entry of the merchandise. HRL 556892 and HRL 556624 are hereby revoked as a result of the position in this ruling regarding the substantial transformation of gold links.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

WITHDRAWAL OF PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF TOWELS OF WEBS OF CELLULOSE FIBERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of withdrawal of proposed modification of tariff classification ruling letter.

SUMMARY: This notice advises interested parties that Customs is withdrawing its proposal to modify a ruling letter pertaining to the tariff classification of towels of webs of cellulose fibers. Notice of the proposed modification was published on November 13, 1996, in the CUSTOMS BULLETIN, pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)).

EFFECTIVE DATE: August 13, 1997.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Office of Regulations and Rulings, Textile Branch, (202) 482–6976.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057 (1993)), on November 13, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Numbers 45/46, proposing to modify New York Ruling Letter (NY) 831278, issued January 20, 1989, which classified towels of webs of cellulose fibers in subheadings 4818.20.0020 and 4803.00.4000, of the Harmonized Tariff Schedule of the United States Annotated. One comment was received in response to this notice. At this time, we have determined that the merchandise at issue should continue to be classified in accordance with NY 831278. Therefore, this notice advises interested parties that Customs is withdrawing its proposal to modify NY 831278.

Dated: July 24, 1997.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED MODIFICATION OF CUSTOMS RULING RELATING TO NAFTA PREFERENCE AND COUNTRY OF ORIGIN MARKING

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of a ruling letter concerning a claim for preferential duty treatment under the North American Free Trade Implementation Act (NAFTA) and country of origin marking.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify two rulings pertaining to claims for NAFTA preference and country of origin marking. Comments are invited on the correctness of the proposed rulings.

DATE: Comments must be received on or before September 12, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, D.C.

FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marking Branch (202) 482–6945.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In NY A89110, Customs found that two surgical kits ("Dry Skin Scrub Tray Kit" and "Wet Skin Scrub Tray Kit") were "goods put up in sets for retail sale", under General Rule of Interpretation (GRI) 3, Harmonized Tariff Schedule of the United States (HTSUS). Customs also held that each kit was eligible for preferential duty treatment under the NAFTA, that the country of origin of each kit was Mexico, and that accordingly both surgical kits were eligible for the "Special" MX duty rate. Customs also found that an appropriate marking for each kit would be "Assembled in Mexico from U.S. components; glove made in Malaysia." NY A89110 is set forth as "Attachment A" to this document.

Based on application of the 19 CFR Part 102 NAFTA Marking Rules, Customs now finds that the country of origin of the Dry Skin Scrub Tray Kit and the Wet Skin Scrub Tray Kit is the U.S. Further, as the goods are of U.S.-origin, the marking "Assembled in Mexico from U.S. components; glove made in Malaysia" is not a correct marking, as it indicates that the kits are of Mexican origin. As the kits are considered to be of U.S.-origin, they are excepted from marking pursuant to section 134.32(m), Customs Regulations (19 CFR 134.32(m)).

Customs intends to modify NY A89110 to reflect that the country of origin of the Dry Skin Scrub Tray Kit and Wet Skin Scrub Tray Kit is the U.S., that the two kits will not be eligible for the "Special" MX rate of duty, and that the marking "Assembled in Mexico from U.S. components; glove made in Malaysia" is not a correct marking. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters Ruling 560456, modifying NY A89110, is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 29, 1997.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 25, 1996.

CLA-2-48:RR:NC:2:234 A89110
Category: Classification
Tariff No. 4818.20.0020 and 9801.00.10

MS. ELVA ARZATE
RUDOLPH MILES & SONS, INC.
4950 Gateway East, P.O. Box 11057
El Paso, TX 79983

Re: The tariff classification, NAFTA eligibility, and country of origin marking, of certain surgical kits, from Mexico. Article 509.

DEAR MS. ARZATE:

In your letter dated October 11, 1996, to the Office of Regulations and Rulings, Washington D.C., on behalf of your client. The Kendall Company/Kendall Healthcare Products, Mansfield, Massachusetts, you requested a tariff classification ruling. Samples were submitted, which will be retained for reference.

Your letter described four (4) kits, of which two (2), Kit #3 and Kit #4, will be the subjects of a separate ruling. This ruling will refer to your Kit #1, Dry Skin Scrub Tray, and your Kit #2, Wet Skin Scrub Tray.

These Scrub Tray kits are transparent plastic wrapped packages, containing a variety of components put up in sets for sterile single use in a surgical procedure. All components but one, and all interior packing material, are of U.S. origin. One component of each kit, Latex Glove, is produced in Malaysia

The components are packaged in Mexico, and will be mported through the port of El Paso, Texas.

Classification: You point out, and we agree, that these Scrub Tray kits are, in all material respects, like the surgical prep kits discussed and ruled upon in HQ 555520, October 29, 1990.

Accordingly, these products will be considered "goods put up in sets for retail sale", and their classification will be governed by General Rule of Interpretation 3(c), Harmonized Tariff Schedule of the United States (HTS).

Under the rule the heading which occurs last in numerical order among those which equally merit consideration in these sets is 4818, which provides for Paper Towels, of which there are three (3) in each set.

The applicable subheading for these sets will be 4818.20.0020, HTS, which provides for: Towels of paper pulp, paper, cellulose wadding or webs of cellulose fibers. The general rate of duty is 4.2 percent. Allowances in duty may be made for the value of the U.S. articles that are merely packaged abroad, under subheading 9801.00.10, HTS.

NAFTA Eligibility: These Scrub Trays meet the definition of *"goods originated in the territory of a NAFTA party"*, as described in General Note 12(b)(ii)(A), HTS. Pursuant to (a)(ii) of the Note, they are eligible for the duty rate in the "Special" subcolumn followed by the symbol "MX" in parentheses, alongside subheading 4818.20.00. That duty rate is Free.

Marking: The country of origin of these scrub trays, for marking purposes, is Mexico. (19 C.F.R. 102.11(a)(3)).

Appropriate marking would be "Assembled in Mexico from U.S. components; Glove made in Malaysia." (19 C.F.R. 134.43(e)(2)).

(The sample submitted is already marked "Assembled in Mexico", in a conspicuous place on a large paper label, visible through the outer plastic container.

This ruling is being issued under the provisions of Section 181 of the Customs Regulations (19 C.F.R. 181).

A copy of this ruling letter or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding this ruling, contact National Import Specialist Carl Abramowitz, at (212) 466–5733.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

MAR–05: RR:TC:SM 560456 BLS
Category: Marking

MS. ELVA ARZATE
RUDOLPH MILES & SONS
4950 Gateway East
El Paso, TX 79983

Re: Reconsideration of NY Ruling Letter A89110; surgical sets; NAFTA Preference; country of origin marking; Article 509.

DEAR MS. ARZATE:

This is in reference to your letter dated April 28, 1997, requesting clarification of NY Ruling Letters A89110 (November 25, 1996) and B83438 (April 15, 1997).

Facts:

In your ruling request dated October 15, 1996, you asked that Customs rule on the tariff classification and country of origin marking of four surgical kits imported from Mexico, and whether such kits are eligible for preferential duty treatment under the North American Free Trade Implementation Act (NAFTA). Customs addressed these issues in NY A89110 with respect to Kit #1 and Kit #2, and in NY B83438 with respect to Kit #3 and Kit #4. You believe that the rulings may not be consistent and therefore seek a clarification of Customs position. This ruling will deal only with NY A89110. A second ruling addressing your concerns in connection with NY B83438 will be issued under separate cover.

Dry Skin Scrub Tray (Kit #1)

This kit consists of plastic trays, plastic forcep, plastic sponge stick and plastic wing sponge; absorbent paper towel, blotting paper towel, and blue paper towel; cotton swabs

and latex gloves. The items are all of U.S.-origin with the exception of the latex gloves, which are a product of Malaysia.

Wet Skin Scrub Tray (Kit #2)

The items in this kit consist of plastic trays, plastic sponge stick and plastic wing sponge; absorbent paper towel, blotting paper towel and blue paper towel; povidone iodine scrub solution and povidone iodine paint solution; latex glove and cotton swabs. All of the items are of U.S.-origin, with the exception of the latex gloves, which are a product of Malaysia.

The articles in both kits are packaged in Mexico with U.S.-origin packing materials, and then imported into the U.S.

In NY A89110, Customs found that Kit #1 and Kit #2 were "goods put up in sets for retail sale", and were governed by General Rule of Interpretation (GRI) 3(c), Harmonized Tariff Schedule of the United States (HTSUS), which provides that when goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration. The sets were classified under subheading 4818.20.0020, HTSUS, which provides for: "Towels of paper pulp, paper, cellulose wading or webs of cellulose fibers." Customs also held that each kit was eligible for preferential duty treatment under the NAFTA, that the country of origin of the scrub tray kits was Mexico, and that accordingly the kits were eligible for the "Special" "MX" duty rate. Customs also found that an appropriate marking for each kit would be "Assembled in Mexico from U.S. components; glove made in Malaysia." Our review will address the issues related to NAFTA preferential treatment and country of origin marking requirements.

Issues:

1) Whether the Dry Skin Scrub Tray and the Wet Skin Scrub Tray are eligible for preferential duty treatment under the NAFTA.

2) What are the country of origin marking requiremer ts for the two surgical kits?

Law and Analysis:

A. *NAFTA Preference*

General Note 12 of the HTSUS, incorporates Article 401 of the NAFTA into the HTSUS. General Note 12(b) provides in pertinent part the following:

> For purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "goods originating in the territory of a NAFTA party" only if:
>
> (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
>
> (ii) they have been transformed in the territory of Canada, Mexico, and/or the United States so that—
>
> (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or,
>
> (B) the goods otherwise satisfy the applicable requirements of subdivision (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or
>
> (iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials.

Since, as described, each of the sets is comprised in part of materials which come from countries other than Mexico, Canada and/or the United States, neither General Note 12(b)(i) or 12(b)(iii) is applicable. Therefore, we must ascertain whether the non-originating materials in each case (latex gloves from Malaysia) are transformed in the territory of Canada, Mexico and/or the U.S. pursuant to General Note 12(b)(ii)(A), HTSUS. To qualify under this provision, the non-originating material(s) must undergo the requisite change in tariff classification required in General Note 12(t).

As noted, both surgical kits are classified in subheading 4818.20.0020, HTSUS, as "Towels of paper pulp, paper, cellulose wading or webs of cellulose fibers." The non-originating latex gloves are properly classified in 4015.11, HTSUS, as "Articles of apparel and clothing accessories (including gloves) for all purposes, of vulcanized rubber, surgical and medical."

General Note 12(t)(90)(48), HTSUS, requires "A change to headings 4817 through 4823 from any heading outside that group."

Thus, the requisite change in tariff classification does occur with respect to Kit #1 and Kit #2, and the *Dry Skin Scrub Tray* and *Wet Skin Scrub Tray* are considered to be "goods originating in the territory of a NAFTA party."

General Note, 12(a) provides in pertinent part that:

* * * * * * *

> (ii) Goods that originate in the territory of a NAFTA party under subdivision (b) of this note and that qualify to be marked as goods of Mexico under the terms of the marking rules * * * and are entered under a subheading for which a rate of duty appears in the "Special" subcolumn followed by the symbol "MX" in parentheses, are eligible for such duty rate * * *.

Since Kit #1 and Kit #2 are classified under subheading 4818.20, HTSUS, a subheading for which the "Special" rate of duty of "MX" is applicable, and are "originating" goods under General Note 12(b), HTSUS, they will be eligible for the MX duty rate provided they are determined to be a product of Mexico under the NAFTA Marking Rules.

B. *Country of Origin Marking*

The marking statute, section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

The country of origin marking requirements for a "good of a NAFTA country" are also determined in accordance with Annex 311 of the NAFTA, as implemented by section 207 of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (December 8, 1993) and the regulations set forth in 19 CFR Parts 102, 134.

Section 134.1(b) (19 CFR 134.1(b)) of the regulations defines "country of origin" as:

> The country of manufacture, production, or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin"; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

Section 134.1(j) provides that the "NAFTA Marking Rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country. Section 134.1(g) defines a "good of a NAFTA country" as an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules.

Part 102 of the regulations (19 CFR Part 102); sets forth the "NAFTA Marking Rules" for purposes of determining whether a good is a good of a NAFTA country. Section 102.11 of the regulations (19 CFR 102.11) sets forth the required hierarchy for determining country of origin for marking purposes. Section 102.11(a) provides that "[t]he country of origin of a good is the country in which:

> (1) The good is wholly obtained or produced;
> (2) The good is produced exclusively from domestic materials; or
> (3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other requirements of these rules are satisfied.

"Foreign Material" is defined in section 102.1(e) of the regulations as "a material whose country of origin as determined under these rules is not the same country as the country in which the good is produced."

Since neither Kit #1 or Kit #2 is wholly obtained or produced, or produced exclusively from domestic (Mexican) materials, section 102.11(a)(3) is the applicable rule which must first be applied. In order to determine whether Mexico is the country of origin under this rule, we must look at those materials whose country of origin is other than Mexico. In this case, none of the components (materials) of the kits are products of Mexico, but are either of U.S. ("Foreign Material" under 19 CFR 102.11(e)) or Malaysian origin.

As both sets are classified under subheading 4818.20, HTSUS, the change in tariff classification must be made in accordance with section 102.20(r), Section X: Chapters 47 through 49, which provides as follows:

> A change to headings 48.17 through 48.22 from any other heading, including another heading within that group.

Since Kit #1 and Kit #2 are comprised in part of components (paper towels of U.S.-origin) that are classified under heading 4818, HTSUS, and which therefore do not undergo a tariff shift, the country of origin cannot be determined under 19 CFR 102.11(a)(3). Furthermore, since the foreign materials in each of the sets are merely packaged together for importation without more than minor processing, they will not be considered to have met the applicable change in tariff classification set out in 19 CFR 102.20. *See* 19 CFR 102.17.

Therefore, we must consider the next applicable rule in the hierarchal scheme. Section 102.11(b) of the regulations (19 CFR 102.11(b)) cannot be used under the facts presented since it is not applicable if the good is specifically described in the Harmonized System as a set, or is classified as a set pursuant to GRI 3.

Since each set is deemed to be originating, and a single NAFTA country of origin for each of the sets cannot be determined pursuant to 19 CFR 102.11(a) or 19 CFR 102.11(b), the NAFTA Preference Override (19 CFR 102.19) is triggered. This regulation provides as follows:

> (a) Except in the case of goods covered by paragraph (b) of this section, if a good which is originating * * * is not determined under section 102.11(a) or (b) or 102.21 to be a good of a single NAFTA country, the country of origin of such good is the last NAFTA country in which the good underwent production other than minor processing provided that a Certificate of Origin (see section 181.11 of this chapter) has been completed and signed for the good.
>
> (b) If, under any provision of this part, the country of origin of a good which is originating * * * is determined to be the United States and that good has been exported from, and returned to, the United States after having been advanced in value or improved in condition in another NAFTA country, the country of origin of such good for Customs duty purposes is the last NAFTA country in which that good was advanced in value or improved in condition.

The components of Kit #1 and Kit #2 are of U.S. or Malaysian origin, and are merely packaged together in Mexico. Since packaging operations are considered minor processing (see 19 CFR 102.1(m)(6)), pursuant to 19 CFR 102.19(a) Mexico cannot be considered the country of origin. Therefore, the country of origin will be the U.S., the last NAFTA country in which the good undergoes production other than minor processing. (In this regard, we note that the word "single" in 19 CFR 102.19(a) expressly makes clear that originating goods that meet the criteria of this provision cannot have multiple countries of origin.) Section 102.19(b) is not applicable because the U.S. components were not advanced in value or improved in condition in another NAFTA country, i.e., by the packing operations performed in Mexico. *(See* 19 CFR 102.1(a) and 102.1(i) (definitions of "advanced in value" and "improved in condition").)

C. *"MX" Duty Rate*

Since under the NAFTA Marking Rules the scrub tray kits are considered to be of U.S.-origin, they are not eligible for the Special "MX" rate of duty, since they do not qualify to be marked as goods of Mexico pursuant to General Note 12(a)(ii), HTSUS.

Furthermore, since the U.S. components of the set will be considered products of the United States exported and returned, they are excepted from marking pursuant to section 134.32(m), Customs Regulations (19 CFR 134.32(m)).

D. *Subheading 9801.00.10*

Subheading 9801.00.10, HTSUS, generally provides for the free entry of products of the U.S. that have been exported and returned without having been advanced in value or improved in condition by any process or manufacture or other means while abroad. Accordingly, the U.S.-origin components which are merely packaged with the set without further processing and the U.S.-origin packaging materials will be entitled to duty-free treatment under subheading 9801.00.10, HTSUS, provided the documentary requirements of section 10.1, Customs Regulations (19 CFR 10.1) are met.

Holding:

1) The non-originating materials which are packaged as part of the Scrub Tray Kits undergo a tariff shift pursuant to General Note 12(b)(ii)(A). Therefore, the *Dry Skin Scrub Tray Kit* and the *Wet Skin Scrub Tray Kit* are considered "goods originating in the territory of a NAFTA party."

2) Under the NAFTA Marking Rules, 19 CFR 102.11(a) is not applicable since the kits are neither wholly obtained or produced, or produced exclusively from domestic sources

and the non-originating materials do not undergo a tariff shift under the applicable rule. Further, since the goods are merely packaged without more than minor processing, they will not be considered to have met the change in classification set out in 19 CFR 102.20. *See* 19 CFR 102.17. 19 CFR 102.11(b) is not applicable since the kits are classified as sets pursuant to GRI 3(c), HTSUS.

As each set is deemed to be originating, 19 CFR 102.19 is triggered. Under this rule, the country of origin of each set will be the U.S., the last NAFTA country in which the good undergoes production other than minor processing.

3) Since under the NAFTA Marking Rules the scrub tray kits are considered to be products of the U.S., they are not eligible for the Special "MX" rate of duty, since they do not qualify to be marked as goods of Mexico pursuant to General Note 12(a)(ii), HTSUS:

4) The U.S.-origin set components which are merely packaged without further processing and the U.S.-origin packaging materials will be entitled to duty-free treatment under subheading 9801.00.10, HTSUS, provided the documentary requirements of section 10.1, Customs Regulations (19 CFR 10.1) are met.

NY Ruling A89110 is modified to the extent it held that the country of origin of the two Scrub Tray Kits to be Mexico, and not the U.S., and that the Special "MX" rate of duty was applicable. Further, the marking "Assembled in Mexico from U.S. components; glove made in Malaysia" is not a correct marking, as it indicates that the kits are of Mexican origin. As the kits are considered to be of U.S.-origin, they are excepted from marking pursuant to 19 CFR 134.32(m).

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 4, 122, 123, 148, and 192

RIN 1515–AB99

LAY ORDER PERIOD; GENERAL ORDER; PENALTIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to require that the importing carrier notify a bonded warehouse proprietor of the presence of merchandise that has remained at the place of arrival or unlading beyond the lay order period without entry having been completed, thereby initiating the obligation of the bonded warehouse proprietor to arrange for transportation and storage of the unentered merchandise at the risk and expense of the consignee. The document also proposes to amend the Customs Regulations to provide for penalties against importing carriers for failure to notify Customs of the presence of such merchandise. These proposed regulatory changes reflect amendments to the underlying statutory authority enacted as part of the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act. Finally, the document makes certain conforming changes to the Customs Regulations in order to reflect a number of other statutory amendments and repeals enacted by the Customs Modernization provisions and in order to reflect the recent recodification and reenactment of title 49, United States Code.

DATES: Comments must be received on or before September 29, 1997.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue NW., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street NW., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings (202) 482–6950.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, amendments to certain Customs and navigation laws became effective as the result of enactment of the North American Free Trade Agreement Implementation Act, Public Law 103–182, 107 Stat. 2057. Title VI of that Act sets forth Customs Modernization provisions that are popularly referred to as the Mod Act.

Section 656 of the Mod Act amended section 448(a) of the Tariff Act of 1930 (19 U.S.C. 1448(a)) to provide, *inter alia*, that: (1) the owner or master of any vessel or vehicle, or the agent thereof, shall notify Customs of any merchandise or baggage unladen for which entry is not made within the time prescribed by law or regulation; (2) the Secretary of the Treasury shall by regulation prescribe administrative penalties not to exceed $1,000 for each bill of lading for which notice is not given; (3) any such administrative penalty shall be subject to mitigation and remission under section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618); and (4) such unentered merchandise or baggage shall be the responsibility of the master or person in charge of the importing vessel or vehicle, or agent thereof, until it is removed from the carrier's control in accordance with section 490 of the Tariff Act of 1930, as amended (19 U.S.C. 1490). This document proposes to revise paragraph (a) of § 4.37 of the Customs Regulations (19 CFR 4.37) and add new § 122.50 and § 123.10 (19 CFR 122.50 and 19 CFR 123.10) to implement these Mod Act statutory changes for air, land and sea carriers. Under the proposed regulatory text, importing carriers would be afforded a five-working-day lay order period after the conclusion of an initial five-working-day period after unlading or arrival of merchandise to notify Customs, in writing or by any Customs-authorized electronic data interchange system, of the presence of the unentered merchandise or baggage. Penalties may result if, after the five-day lay order period, Customs has not been notified of the presence of the merchandise. Applications for lay order will no longer be required on Customs Form 3171; the form will continue to be maintained for other purposes.

Section 658 of the Mod Act amended section 490 of the Tariff Act of 1930 (19 U.S.C. 1490) to provide that: (1) except in the case of U.S. government importations, the importing carrier shall notify the bonded warehouse of any imported merchandise for which entry is not made within the time prescribed by law or regulation, or for which entry is incomplete because of failure to pay estimated duties, fees or interest, or for which entry cannot be made for want of proper documents or other cause, or which Customs believes is not correctly and legally invoiced; and (2) after such notification from the importing carrier, the bonded warehouse shall arrange for the transportation and storage of the merchandise at the risk and expense of the consignee. This document proposes to revise paragraph (b) of § 4.37 of the Customs Regulations and add sections 122.50 and 123.10 to the Customs Regulations to implement these Mod Act statutory changes. The proposed regulatory text

requires the carrier to provide the appropriate notification, in writing or by any Customs-authorized electronic data interchange system, and also requires that the bonded warehouse operator take possession of the merchandise within five working days after receipt of such notification or else be liable for liquidated damages under the terms and conditions of his custodial bond (and with a cross-reference to § 113.63(a)(1) of the Customs Regulations which Customs believes provides an appropriate basis for such liability). In addition, it is proposed to amend paragraph (d) of § 4.37 by replacing the word "owner" by "consignee" to align on the corresponding statutory language.

Section 611 of the Mod Act amended section 436 of the Tariff Act of 1930 (19 U.S.C. 1436), *inter alia*, by including therein a reference to 46 U.S.C. App. 91, with the result that penalties for violations of outbound vessel manifest filing requirements would be incurred under the provisions of 19 U.S.C. 1436 rather than under 46 U.S.C. App. 91. This document proposes to amend § 192.4 of the Customs Regulations (19 CFR 192.4) to reflect this change.

Section 690 of the Mod Act provided for the repeal of a number of statutory provisions, some of which are still referred to in Parts 4 and 122 of the Customs Regulations (19 CFR Parts 4 and 122). This document proposes to correct those outdated references by removing them or replacing them with references to their successor statutory provisions.

Finally, Public Law 103–272, 108 Stat. 745, dated July 5, 1994, reenacted and recodified the provisions of title 49, United States Code. Section 2(b) thereof reenacted as a new section (19 U.S.C. 1644a) certain title 49 provisions dealing with the application, to civil aircraft, of the laws and regulations regarding the entry and clearance of vessels. This document proposes to amend Parts 122, 123 and 148 of the Customs Regulations (19 CFR Parts 122, 123 and 148) by updating the "49 U.S.C. App." statutory references therein to reflect the changes made by section 2(b) or other provisions of Public Law 103–272.

COMMENTS

Before adopting this proposed regulation as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1099 14th St., N.W., 4th floor, Washington, D.C.

INAPPLICABILITY OF THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

For the reasons set forth above and because the proposed amendments conform the Customs Regulations to statutory requirements that are already in effect, pursuant to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is certified that the proposed

amendments, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Further, this document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

LIST OF SUBJECTS

19 CFR Part 4

Cargo vessels, Common carriers, Customs duties and inspection, Entry, Exports, Fishing vessels, Imports, Maritime carriers, Passenger Vessels, Penalties, Reporting and recordkeeping requirements, Shipping, Vessels, Yachts.

19 CFR Part 122

Air carriers, Aircraft, Airports, Air transportation, Baggage, Bonds, Customs duties and inspection, Foreign commerce and trade statistics, Freight, Imports, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 123

Aircraft, Canada, Customs duties and inspection, Imports, International boundaries, International traffic, Mexico, Motor carriers, Railroads, Reporting and recordkeeping requirements, Trade agreements, Vehicles, Vessels.

19 CFR Part 148

Aliens, Baggage, Crewmembers, Customs duties and inspection, Declarations, Foreign officials, Government employees, International organizations, Privileges and Immunities, Reporting and recordkeeping requirements.

19 CFR Part 192

Aircraft, Customs duties and inspection, Export Control, Penalties, Reporting and recordkeeping requirements, Seizures and forfeiture, Vehicles, Vessels.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend Parts 4, 122, 123, 148 and 192 of the Customs Regulations (19 CFR Parts 4, 122, 123, 148 and 192) as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority citation for Part 4 and the specific authority citations for §§ 4.7a, 4.36 and 4.37 continue to read, and the specific authority citations for §§ 4.9 and 4.68 are revised to read, as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91.

* * * * * * *

Section 4.7a also issued under 19 U.S.C. 1498, 1584;

* * * * * * *

Section 4.9 also issued under 42 U.S.C. 269;

* * * * * * *

Section 4.36 also issued under 19 U.S.C. 1431, 1457, 1458, 46 U.S.C. App. 100;

Section 4.37 also issued under 19 U.S.C. 1448, 1457, 1490;

* * * * * * *

Section 4.68 also issued under 46 U.S.C. App. 817d, 817e;

* * * * * * *

2. Part 4 is amended by removing and reserving footnotes 17, 24, 71, and 74 in sections 4.7a(a), 4.12(a)(3), 4.36(c) and 4.37(d).

3. In § 4.6, paragraph (c) is amended by removing the reference "19 U.S.C. 1585" and adding, in its place, the reference "19 U.S.C. 1436".

4. In § 4.7a, the first sentence of paragraph (a) is amended by removing the words ", required by section 432, Tariff Act of 1930, to be separately specified".

5. In § 4.36, paragraph (c) is amended by removing the words "within the purview of the proviso to the first subdivision of section 431 of the Tariff Act of 1930".

6. In § 4.37, paragraph (d) is amended by removing the word "owner" and adding, in its place, the word "consignee" and paragraphs (a) and (b) are revised to read as follows:

§ 4.37 Lay Order; general order.

(a) Any merchandise or baggage regularly landed but not covered by a permit for its release shall be allowed to remain at the place of unlading until the close of business on the fifth working day after the day the vessel was entered. Within an additional five-working-day lay order period following the expiration of the original five-working day period after landing, 19 U.S.C. 1448(a) requires the master or owner of the vessel or the agent thereof to notify Customs of any such merchandise or baggage for which entry has not been made. Such notification shall be provided in writing or by any Customs-authorized electronic data interchange system. Failure to provide such notification may result in assessment of a monetary penalty of up to $1,000 per bill of lading against the master or owner of the vessel or the agent thereof as provided in 19 U.S.C. 1448(a).

(b) In addition to the notification to Customs referred to in paragraph (a) of this section, within five working days following the expiration of the lay order period specified in paragraph (a) of this section, 19 U.S.C. 1490(a) requires the master or owner of the vessel or the agent thereof to provide notification of the presence of such unreleased and unentered merchandise or baggage to a bonded warehouse certified by the port director as qualified to receive general order merchandise. Such notification shall be provided in writing or by any Customs-authorized electronic data interchange system. It shall then be the responsibility of the bonded warehouse proprietor to arrange for the transportation and storage of the merchandise or baggage at the risk and expense of the

consignee. Any unentered merchandise or baggage shall remain the responsibility of the master or person in charge of the importing vessel or the agent thereof until it is removed from his control in accordance with this paragraph. If the bonded warehouse operator fails to take possession of the merchandise or baggage within five working days after receipt of notification of the presence of the unentered and unreleased merchandise or baggage, he shall be liable for the payment of liquidated damages under the terms and conditions of his custodial bond (see § 113.63(a)(1) of this chapter).

* * * * * * *

PART 122—AIR COMMERCE REGULATIONS

1. The authority citation for Part 122 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 58b, 66, 1433, 1436, 1448, 1459, 1590, 1594, 1623, 1624, 1644, 1644a.

2. Section 122.2 is amended by removing the reference "49 U.S.C. App. 1509(c)" and adding, in its place, the reference "19 U.S.C. 1644 and 1644a".

3. Section 122.49(f) is amended by removing the words "sections 440 (concerning post entry) and 584 (concerning manifest violations), Tariff Act of 1930, as amended (19 U.S.C. 1440, 1584), apply" and adding, in their place, the words "section 584 (concerning manifest violations), Tariff Act of 1930, as amended (19 U.S.C. 1584), applies".

4. In Subpart E, § 122.50 is added to read as follows:

§ 122.50 Lay order; general order.

(a) Any merchandise or baggage regularly landed but not covered by a permit for its release shall be allowed to remain at the place of unlading until the close of business on the fifth working day after the day the aircraft was entered. Within an additional five-working-day lay order period following the expiration of the original five-working day period after landing, 19 U.S.C. 1448(a) requires the pilot or owner of the aircraft or the agent thereof to notify Customs of any such merchandise or baggage for which entry has not been made. Such notification shall be provided in writing or by any Customs-authorized electronic data interchange system. Failure to provide such notification may result in assessment of a monetary penalty of up to $1,000 per bill of lading against the pilot or owner of the aircraft or the agent thereof as provided in 19 U.S.C. 1448(a).

(b) In addition to the notification to Customs referred to in paragraph (a) of this section, within five working days following the expiration of the lay order period specified in paragraph (a) of this section, 19 U.S.C. 1490(a) requires the pilot or owner of the aircraft or the agent thereof to provide notification of the presence of such unreleased and unentered merchandise or baggage to a bonded warehouse certified by the port director as qualified to receive general order merchandise. Such notification shall be provided in writing or by any Customs-authorized electronic data interchange system. It shall then be the responsibility of

the bonded warehouse proprietor to arrange for the transportation and storage of the merchandise or baggage at the risk and expense of the consignee. Any unentered merchandise or baggage shall remain the responsibility of the pilot or person in charge of the importing aircraft or the agent thereof until it is removed from his control in accordance with this paragraph. If the bonded warehouse operator fails to take possession of the merchandise or baggage within five working days after receipt of notification of the presence of the unentered and unreleased merchandise or baggage, he shall be liable for the payment of liquidated damages under the terms and conditions of his custodial bond (see § 113.63(a)(1) of this chapter).

5. In § 122.161, the first sentence is amended by removing the reference "§ 122.14" and adding, in its place, the words "subpart S of this part" and by removing the reference "49 U.S.C. App. 1474" and adding, in its place, the reference "19 U.S.C. 1644 and 1644a".

6. In § 122.165, the first sentence of paragraph (a) is amended by removing the parenthetical reference "(49 U.S.C. App. 1508(b))" and adding, in its place, the parenthetical reference "(49 U.S.C. 41703)", and the second sentence of paragraph (b) is amended by removing the reference "49 U.S.C. App. 1471" and adding, in its place, the reference "49 U.S.C. Chapter 463".

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The general authority citation for Part 123 and the specific authority citation for § 123.8 are revised to read, and the specific authority citation for § 123.1 continues to read, as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States (HTSUS)), 1431, 1433, 1436, 1448, 1624.

Section 123.1 also issued under 19 U.S.C. 1459;

* * * * * * *

Section 123.8 also issued under 19 U.S.C. 1450–1454, 1459;

* * * * * * *

2. The specific authority citation for § 123.11 is removed.

3. In § 123.1, paragraph (a)(2) is amended by removing the words "sections 1433 or 1644 of title 19, United States Code (19 U.S.C. 1433, 1644), or section 1509 of title 49, United States Code App. (49 U.S.C. App. 1509)," and adding, in their place, the words "section 1433, 1644 or 1644a of title 19, United States Code (19 U.S.C. 1433, 1644, 1644a),".

4. In Subpart A, § 123.10 is added to read as follows:

§ 123.10 Lay order; general order.

(a) Any merchandise or baggage regularly landed but not covered by a permit for its release shall be allowed to remain at the place of unlading until the close of business on the fifth working day after the day the vehicle was entered. Within an additional five-working-day lay order period following the expiration of the original five-working day period

after unlading, 19 U.S.C. 1448(a) requires the operator or owner of the vehicle or the agent thereof to notify Customs of any such merchandise or baggage for which entry has not been made. Such notification shall be provided in writing or by any Customs-authorized electronic data interchange system. Failure to provide such notification may result in assessment of a monetary penalty of up to $1,000 per bill of lading against the operator or owner of the vehicle or the agent thereof as provided in 19 U.S.C. 1448(a).

(b) In addition to the notification to Customs referred to in paragraph (a) of this section, within five working days following the expiration of the lay order period specified in paragraph (a) of this section, 19 U.S.C. 1490(a) requires the operator or owner of the vehicle or the agent thereof to provide notification of the presence of such unreleased and unentered merchandise or baggage to a bonded warehouse certified by the port director as qualified to receive general order merchandise. Such notification shall be provided in writing or by any Customs-authorized electronic data interchange system. It shall then be the responsibility of the bonded warehouse proprietor to arrange for the transportation and storage of the merchandise or baggage at the risk and expense of the consignee. Any unentered merchandise or baggage shall remain the responsibility of the operator or person in charge of the importing vehicle or the agent thereof until it is removed from his control in accordance with this paragraph. If the bonded warehouse operator fails to take possession of the merchandise or baggage within five working days after receipt of notification of the presence of the unentered and unreleased merchandise or baggage, he shall be liable for the payment of liquidated damages under the terms and conditions of his custodial bond (see § 113.63(a)(1) of this chapter).

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The authority citation for Part 148 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 20, Harmonized Tariff Schedule of the United States).

* * * * * * *

2. In § 148.67, paragraph (b) is amended by removing the words "section 1474 of title 49, United States Code," and adding, in their place, the reference "19 U.S.C. 1644 and 1644a".

PART 192—EXPORT CONTROL

1. The authority citation for Part 192 continues to read as follows:

Authority: 19 U.S.C. 66, 1624, 1627a, 1646a.

2. In § 192.4, the first sentence is amended by removing the reference "46 U.S.C. App. 91" and adding, in its place, the reference "19 U.S.C. 1436" and the second sentence is amended by removing the words "a li-

ability of not more than $1,000 nor less than $500 will be incurred" and adding, in their place, the words "a liability for penalties may be incurred".

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: May 21, 1997.
DENNIS M. O'CONNELL,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, July 31, 1997 (62 FR 40992)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
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Senior Judges

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Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

(Slip Op. 97–101)

DAZZLE MFG., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–09–01133

[Action dismissed in its entirety with prejudice for lack of jurisdiction.]

(Decided July 23, 1997)

Becker & Poliakoff (Peter A. Quinter) for plaintiff.
Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara M. Epstein)* for defendant.

OPINION

INTRODUCTION

WALLACH, *Judge:* Plaintiff Dazzle Mfg., Ltd. ("Dazzle") brought this action to contest the denial of its protests in connection with nine entries of textile imports. Defendant moved to dismiss the case for lack of subject matter jurisdiction because Dazzle had failed to pay all duties and interest on these entries prior to commencing the action, as required by 28 U.S.C. § 2637(a) (1994). Plaintiff responded that its failure to make timely payment was due to reliance on incorrect information provided by U.S. Customs Service ("Customs") to its surety, and that therefore the government should be equitably estopped from asserting this jurisdictional defense.

Defendant's motion to dismiss is granted because the jurisdictional requirement that all liquidated duties, charges or exactions be paid at the time an action is commenced is strictly applied and is not subject to excuse or waiver based upon equitable principles.

BACKGROUND

Plaintiff commenced this action on Aug. 30, 1995, by filing a summons which listed nine entries of textile imports. Customs liquidated three of these entries on July 8, 1994, and the remaining six on Aug. 12, 1994.

Complaint ¶¶ 11–12. Plaintiff's protest regarding the classification and rate of duty assigned to the entries, allegedly submitted on Oct. 7, 1994, was denied by Customs in a letter dated March 8, 1995. Complaint ¶¶ 14–18.

Defendant moved to dismiss the case for lack of jurisdiction pursuant to USCIT Rule 12(b)(1), because Plaintiff had failed to pay all duties and/or interest prior to commencing the action, as required by 28 U.S.C. § 2637(a), and, additionally, had not filed timely protests with respect to three of the entries, as required by 19 U.S.C. § 1514(a) (1994), thus depriving the Court of jurisdiction over them.

Plaintiff conceded that all duties, charges or exactions had not been paid at the time of filing the summons. Plaintiff's Reply Motion to Defendant's Motion to Dismiss ("Plaintiff's Reply") at 1. Plaintiff argued, however, that payment for the nine entries was late due to its reliance on incorrect information provided by Customs in violation of applicable regulations, and that, consequently, the government should be stopped from claiming that the Court does not have subject matter jurisdiction. *Id.* at 2–4. The regulations in question included 19 C.F.R. §§ 24.3a(c)(4) and (d)(2) (1995), requiring Customs to apply a late payment first to the interest accrued on the delinquent principal amount and, respectively, to provide certain information to an importer's surety. Because this Court finds that Plaintiff's theory of estoppel against the government is untenable, it is unnecessary to address Defendant's arguments that Customs in fact complied with the above regulations and that Plaintiff has failed to establish the requisite elements of estoppel.

The record shows that because Dazzle had failed to pay duties and interest owed on the nine entries after their liquidation, Customs sent a formal demand for payment to Dazzle's surety, American Home Assurance Company, in a letter dated April 13, 1995. Ex. A to Plaintiff's Reply. The surety paid the bills with a separate check for each entry. However, the checks were sent after the due date specified in Customs' letter. *Id.* Accordingly, Customs sent another formal demand to the surety on Aug. 7, 1995, requesting payment for additional interest in the amount of $966.10, which had accrued on the bills because payment was late. Ex. B to Plaintiff's Reply. Dazzle paid that amount with a check dated Sept. 27, 1995. Ex. C to Plaintiff's Reply.

DISCUSSION

Plaintiff commenced this action under 28 U.S.C. § 1581(a) (1994) to contest Custom's denial of its protests. Pursuant to 28 U.S.C. § 2637(a)[1], the payment of all liquidated duties, charges or exactions at the time the action was commenced is a condition precedent to invoking the jurisdiction of the U.S. Court of International Trade in an action brought under section 1581(a). *Melco Clothing Co. v. United States*, 16 CIT 889, 890,

[1] 28 U.S.C. § 2637(a) provides:

A civil action contesting the denial of a protest under section 515 of the Tariff Act of 1930 may be commenced in the Court of International Trade only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced * * *.

804 F. Supp. 369, 371 (1992). The condition is to be strictly applied and the statute precludes any exercise of discretion by the court. *Penrod Drilling Co. v. United States*, 13 CIT 1005, 1007, 727 F. Supp. 1463, 1465 (1989), *reh'g denied*, 14 CIT 281, 740 F. Supp. 858 (1990), *aff'd*, 9 Fed. Cir. (T) 60, 925 F.2d 406 (1991); *United States v. Boe*, 64 CCPA 11, 16, 543 F.2d 151, 155 (1976).

This action was commenced on August 30, 1995, when the summons was filed. USCIT R. 3(a); *Penrod*, 13 CIT at 1007, 727 F. Supp. at 1465. Dazzle made the last payment on its nine delinquent duty bills on Sept. 27, 1995, almost a month after this date. Thus, it is undisputed that payment for all duties, charges or exactions was not made at the time of commencing this action. It is immaterial if Dazzle's payment discharged interest accrued on the bills because of the surety's late payment, since section 2637(a)'s "terms charges or exactions include the assessment of interest on the late payment of liquidated duties." *Syva Co. v. United States*, 12 CIT 199, 205, 681 F. Supp. 885, 890 (1988). Consequently, failure to pay such interest constitutes an omission, which is "fatal" and deprives the court of jurisdiction.[2] 12 CIT at 199, 681 F. Supp. at 886.

Despite the clear statutory mandate and numerous decisions which have applied strictly section 2637(a)'s requirement, Plaintiff maintains that the Court should assume jurisdiction over this case on a theory of equitable estoppel. However, it is well settled that in a suit against the government, jurisdictional requirements cannot be waived or subject to excuse or remedy on the basis of equitable principles. *Mitsubishi Electronics America, Inc. v. United States*, 18 CIT 929, 932, 865 F. Supp. 877, 880 (1994). Such requirements must be strictly construed since a court has no power to relax the statutory preconditions for waiver of sovereign immunity. *Halperin Shipping Co., Inc. v. United States*, 14 CIT 438, 443, 742 F. Supp. 1163, 1168 (1990). *See also United States v. Sherwood*, 312 U.S. 584, 61 S.Ct. 767 (1940); *United States v. Mitchell*, 445 U.S. 535, 100 S.Ct. 1349 (1980). As this Court has held:

> Fundamentally, of course, the United States is immune from suit except in accordance with the terms and conditions under which it consents to be sued. In section 2637(a), Congress manifestly expressed its intent that payment of liquidated duties **at the time the action is commenced** is a prerequisite to the filing of summons in an action brought to contest the denial of a protest. And "[t]he terms of the government's consent to be sued in any particular court define the court's jurisdiction to entertain suit." Further, "[c]onditions upon which the government consents to be sued must be strictly observed and are not subject to implied exceptions." Consequently, the court cannot entertain jurisdiction in this action based upon the exercise of discretion or equity powers * * * [and] plaintiff's contention that noncompliance with section 2637(a)

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[2] In addition, it would not matter if the unpaid interest was minimal because "§ 2637(a) is to be applied strictly, [and] no exceptions may be read into law for nominal amounts left unpaid at the time the summons is filed." *Penrod*, 13 CIT at 1008, 727 F. Supp. at 1466.

> "may be subject to excuse and remedied upon equitable principles" must be rejected * * *.

Glamorise Foundations, Inc. v. United States, 11 CIT 394, 397–98, 661 F. Supp. 630, 632–33 (1987) (citations omitted). Thus, plaintiff's claim of equitable estoppel against the government is without merit, and must be similarly rejected.[3]

Furthermore, it is uncertain when, if ever, a claim of equitable estoppel can lay against the government. While in *Richmond* the Supreme Court left open the possibility "that some type of 'affirmative misconduct' might give rise of estoppel against the Government", it also noted that "we have reversed every finding of estoppel that we have reviewed." 496 U.S. at 421, 422, 110 S.Ct. at 2470. Leaving aside the question of jurisdiction, this case cannot be the proper one to fill the gap left open in *Richmond* because "equitable estoppel, even if available in cases involving the Government in its proprietary capacity, is not available against the Government in cases involving the collection or refund of duties on imports [where it acts in its sovereign capacity]."[4] *Air-Sea Brokers, Inc. v. United States*, 66 CCPA 64, 68, 596 F.2d 1008, 1011 (1979). *See also United States v. Reliable Chemical Co.*, 66 CCPA 123, 128, 605 F.2d 1179, 1184 (1979); *Wally Packaging, Inc. v. United States*, 7 CIT 19, 21, 578 F. Supp. 1408, 1410–11 (1984).

In summary, the Court lacks jurisdiction over this action by virtue of plaintiff's failure to comply with the requirement of 28 U.S.C. § 2637(a), which cannot be excused or remedied on the basis of equitable principles.[5]

CONCLUSION

For the foregoing reasons, Defendant's motion is granted, and this action is dismissed.

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[3] The only decision cited by plaintiff in support of its claim of equitable estoppel, *Richmond v. Office of Personnel Management*, 862 F.2d 294 (Fed. Cir. 1988), does not involve the issue of estoppel in connection to jurisdiction, or even in connection to import duties. In addition, Plaintiff fails to note that the decision, granting estoppel against the government's denying disability benefits to a person who had relied on the erroneous advice of a government employee, was **reversed** by the Supreme Court. *Richmond v. Office of Personnel Management*, 496 U.S. 414, 110 S.Ct. 2465 (1990).

[4] This view is also supported by *Richmond*, where considerations of preventing collusion and protecting the public treasury supported the holding that "claims for estoppel cannot be entertained where public money is at stake * * *." 496 U.S. at 427, 110 S.Ct. at 2473.

[5] In addition, even if plaintiff had satisfied section 2637(a)'s jurisdictional requirement, the Court would still lack jurisdiction over three of the nine entries listed on the summons, because plaintiff failed to make a timely protest with respect to them. 19 U.S.C. § 1514(c)(3) provides that "[a] protest of a decision, order, or finding * * * shall be filed with the Customs Service within ninety days after but not before—(A) notice of liquidation * * *." Plaintiff submitted a protest on Oct. 7, 1994, and then resubmitted it on Nov. 9, 1994, after learning that Customs had no record of the original protest. However, the three entries in question were liquidated on July 8, 1994. Complaint ¶¶ 14–17. Thus, even if the Oct. 7 protest was received by Customs, and was received on the same day, it still would have been untimely since the 90th day from the notice of liquidation was Oct. 6, 1994. Thus, Customs' decision with respect to these entries is "final and conclusive" under § 1514(a), and the Court would lack jurisdiction over them.

(Slip Op. 97–102)

UNITED STATES OF AMERICA, PLAINTIFF *v.*
ZIEGLER BOLT AND PARTS CO., DEFENDANT

Court No. 93–03–00162

MEMORANDUM OPINION AND ORDER

CARMAN, *Chief Judge:* Defendant moves this Court pursuant to U.S. CIT R. 68 for an award of attorney's fees and other expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1988), as well as for costs pursuant to 28 U.S.C. § 1920 (1988). Defendant asserts it is entitled to an award of attorney's fees and costs because it was the prevailing party in this matter, *see United States v. Ziegler Bolt and Parts Company*, 883 F. Supp. 740 (CIT 1995) *("Ziegler II"), aff'd*, 111 F.3d 878 (Fed. Cir. 1997), and because the government's position in this matter was not substantially justified. Plaintiff maintains no award of fees or expenses is warranted because the government's position was substantially justified and special circumstances make awarding fees to the defendant unjust.

The Equal Access to Justice Act ("EAJA"), in relevant part, provides

> **§ 2412. Costs and fees**
>
> (a) Except as otherwise specifically provided by statute, a judgment for costs, * * * but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by * * * the United States * * * in any court having jurisdiction of such action. * * *
>
> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States * * *. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law * * *.
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> * * * * * * *
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> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412 (1988).

The government has the burden of establishing that its position was substantially justified or special circumstances exist which would make the award of attorney's fees unjust. *See, e.g., Naekel v. Department of Transportation*, 884 F.2d 1378, 1379 (Fed. Cir. 1989). Substantial justification requires the government's position be "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550,

101 L.Ed.2d 490 (1988). If the government is unable to satisfy this burden, the Court must award fees and expenses. *See Urbano v. United States*, 779 F. Supp. 1398, 1401 (CIT 1991) (citing *Brewer v. American Battle Monuments Comm'n*, 814 F.2d 1564, 1569 (Fed. Cir. 1987)). In reviewing the government's justification of its position, "a court should not lightly infer bad faith on the part of a litigant for purposes of attorney's fees awards." *Atochem v. United States*, 9 CIT 207, 211, 609 F. Supp. 319, 323 (1985).

Because the Court finds the issue of whether the government's position in this litigation was substantially justified is dispositive, it will discuss the arguments raised by the defendant in asserting the government's position was not justified. Defendant first argues the government's position in this litigation was not justified because the government's summary judgment motion was "substantially defeated" and because the government "lost the case." (Def.'s Mem. in Supp. of Applic. for Fees and Other Expenses ("Def.'s Mem.") at 5.)

The Court has little difficulty disposing of these arguments. This Court's dismissal of this action due to a procedural error does not reflect whether the government was substantially justified in prosecuting the case. Indeed, the United States Court of Appeals for the Federal Circuit has noted "the EAJA was not intended to be an automatic fee-shifting device in cases where the petitioner prevails. * * * The mere fact that the United States lost the case does not show that its position in [prosecuting] the case was not substantially justified." *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988) (citations omitted). *See also Gava v. United States*, 699 F.2d 1367, 1371 (Fed. Cir. 1983) (rejecting argument that government's loss in Court of Claims demonstrates its position was not substantially justified). In denying the government's motion for partial summary judgment, this Court did not address the merits of the government's position. Rather, it refused to collaterally estop the defendant from denying civil liability because defendant's liability as to the ninety-eight entries in issue "w[as] not a part of the criminal information or plea agreement" and thus was not fully litigated in the earlier criminal proceedings. *United States v. Ziegler Bolt and Parts Company*, Court No. 93–03–00162, Slip Op. 95–3 at 23–24 (CIT Jan. 13, 1995) *("Ziegler I")*. This Court's denial of the government's summary judgment motion in *Ziegler I* did not foreclose the government's offering evidence and arguing the merits of its position at a later date.

Additionally, defendant argues the government's position was not justified because its action, filed on March 15, 1993, was barred by the statute of limitations. In support of this argument, defendant notes a February 24, 1993 letter signed by government counsel stating the statute of limitations would expire on March 3, 1993. Defendant asserts "[t]he government's obstinate character in continuing to pursue this litigation and claim against Defendant when it clearly and explicitly knew that its cause of action had expired is just the kind of conduct which the

Equal Access to Justice Act was intended to rectify and make whole." (Def.'s Mem. at 5–6.)

In *Ziegler I*, the Court denied defendant's motion for summary judgment based on the statute of limitations, noting "there appear to be material question of fact foreclosing summary judgment on the issue of the statute of limitations. The resolution of these factual disputes is better left for determination at trial." *Ziegler I* at 11. The dismissal of the government's action for lack of proper service of process in *Ziegler II* prevented this Court from addressing the merits of whether the government's claim was barred by the statute of limitations. The government notes, however, the statute provides two different limitation periods depending on whether an action is brought for a grossly negligent or negligent violation, or for a fraudulent violation of 19 U.S.C. § 1592. *See* 19 U.S.C. § 1621 (1988) (providing in cases involving a fraudulent violation of the statute, an action must be "commenced within five years after the time when the alleged offense was discovered", while actions involving negligence must be brought within "five years after the date the alleged violation was committed"). The government asserts "no one in the Customs Service had or could have discovered any fraudulent violation on the part by [sic] Ziegler by March 3, 1993" and notes a declaration executed by a Special Agent of the Department of Transportation states he did not contact the Customs Service regarding the Ziegler matter prior to March 3, 1993. (Pl.'s Resp. in Opp'n to Def.'s Bill of Costs and Application for Fees and Expenses ("Pl.'s Resp.") at 16.)

As noted above, the factual dispute concerning the statute of limitations was not resolved by the Court prior to its dismissal of this matter. The Court observes the allegations raised in the various counts of the government's complaint differentiated the entries at issue. The first count of the government's complaint alleged fraudulent violations of 19 U.S.C. § 1592 with respect to all ninety-eight entries, while the second and third counts alleged a negligent or grossly negligent violation of the statute only with respect to one entry which entered the United States less than five years prior to the government's filing of this matter. Although this Court never reached a determination on the merits with respect to the statute of limitations, based upon its review of the parties' submissions, the Court concludes the government's position in regards to the statute of limitations was substantially justified.

Finally, defendant argues the government's prosecution of this case pursuant to 19 U.S.C. § 1592 was contrary to the customs laws because the goods at issue were properly marked at the time of their entry into the United States, and according to the defendant the statute is not concerned with alterations to the country of origin markings after goods are entered into the United States. Defendant argues the conduct of Ziegler Bolt and Parts Company "could not result or create a cause of action under 19 U.S.C. § 1592 [because that section of the code] focuses on the time of entry." (Def.'s Mem. at 6.)

The government's response notes "the essence of the 'false acts[']and 'omissions' constituting the statutory violations is Ziegler's failure to disclose, *at the time of entry*, that he intended to remove the country of origin markings." (Pl.'s Resp. at 19.) The government's response goes on to note "no court, to date, has ever held that a 'post-entry' removal of country-of-origin markings cannot result in a violation of 19 U.S.C. § 1592," *(id.)*, and asserts "there is no merit to Ziegler's argument that Congress intended to preclude the application of [19] U.S.C. § 1592 to the type of 'post-entry' removal scheme alleged against Ziegler." *(Id.* at 22.)

The Court is concerned that in evaluating whether the government's position was substantially justified, it is treading perilously close to issuing an advisory opinion. While the Court declines to express any position on whether 19 U.S.C. § 1592 applies to post-entry removal of country-of-origin markings, the Court notes that in addition to the first three counts of the government's complaint brought pursuant to 19 U.S.C. § 1592, the fourth count is brought pursuant to 19 U.S.C. §1592(d) for marking duties under 19 U.S.C. § 1304. Without expressing any position as to whether 19 U.S.C. § 1592 applies to post-entry removal of country-of-origin markings, the Court finds the government's complaint, read as a whole, presents a litigation position which is substantially justified and precludes this Court from awarding defendant attorney's fees pursuant to 28 U.S.C. § 2412.

In addition to responding to defendant's arguments, the government asserts it was justified in continuing to prosecute this action following the revelation it improperly served defendant with process. The government claims it "was substantially justified in arguing that Ziegler had submitted to this Court's authority by affirmatively litigating the substantive merits of the fraud case through, *inter alia*, serving interrogatories and document requests, deposing Customs agents, moving to compel discovery, and, ultimately, filing a cross-motion for summary judgment." (Pl.'s Resp. at 8–9.) The government argues "*every* appellate court to have addressed this issue has held that a defendant submits to a court's authority by affirmatively litigating the substantive merits of its case." *(Id.* at 9.)

While this Court determined the government's improper service of process required dismissal of the government's action for civil penalties against the defendant, the government is correct in asserting there is authority in other circuits supporting the proposition that a defendant may waive the defense of lack of personal jurisdiction by actively engaging in the litigation of a case, even though the defendant has not waived its right to raise the defense of lack of personal jurisdiction under Fed.R.Civ.P. 12(h). *See Continental Bank, N.A. v. Meyer,* 10 F.3d 1293, 1297 (7th Cir. 1993) (holding defendants waived defense of lack of personal jurisdiction made in answer through litigating merits by participating in discovery, filing various motions, and opposing motions filed by plaintiff); *Santos v. State Farm Fire and Cas. Co.*, 902 F.2d 1092,

1095–96 (2d Cir. 1990) (holding defendant waived defense of lack of personal jurisdiction by failing to adequately assert the defense through either a motion under Fed.R.Civ.P. 12(b) or in defendant's answer); *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983) (holding defendant waived defense of lack of personal jurisdiction by failing to assert the defense in either a motion under Fed.R.Civ.P. 12(b) or a responsive pleading and by participating in thirteen depositions prior to moving for dismissal); *Vozeh v. Good Samaritan Hospital*, 84 F.R.D. 143, 144 (S.D.N.Y. 1979) (holding defense of lack of personal jurisdiction raised in defendant's answer was waived where defendant offered no proof of assertion until two years after answer was filed); *cf. Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (holding defendant waived defense of lack of personal jurisdiction made in answer by engaging in discovery, filing various motions, participating in a five-day trial and filing post-trial motions); *Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc.*, 376 F.2d 543, 544 (3rd Cir. 1967) (holding defendant waived defense of lack of personal jurisdiction by arguing against plaintiff's motion for preliminary injunction and failing to raise defense of lack of personal jurisdiction until more than two weeks after district court's announcement of its intention to enter preliminary injunction).

Although this Court ultimately determined, and was sustained on appeal, *see United States v. Ziegler Bolt and Parts Company*, 111 F.3d 878 (Fed. Cir. 1997), that it did not have personal jurisdiction over the defendant, the Court finds the government's position in pursuing the litigation was nonetheless substantially justified. The Court observes the defendant had the ability to cut short its involvement in litigating this matter by filing a motion under U.S. CIT R. 12(b) asserting lack of personal jurisdiction due to insufficient service of process. While in *Ziegler II*, this Court noted that such a motion is not required, *see Ziegler II*, 883 F. Supp. at 752 ("This Court rejects the adoption of court-imposed obligations unauthorized by the rules that may effectively force defendants to waive their legitimate affirmative defenses, * * * which have been properly asserted in their answers."), defendant did have this option available but chose not to utilize it. It is quite possible that had defendant exercised its ability to file a motion under U.S. CIT R. 12(b), the duration of this matter could have been shortened significantly, and the defendant could have avoided incurring significant expenses for legal fees and court costs.

Additionally, the Court rejects defendant's application for costs pursuant to 28 U.S.C. § 1920. The Court notes the statute vests discretion in the Court in awarding costs. *See* 28 U.S.C. § 1920 (1988) (emphasis added) ("A judge or clerk of any court of the United States *may* tax as costs the following * * *."). The Court, having determined the government's position was substantially justified, declines to exercise its discretion in favor of awarding defendant its costs.

(Slip Op. 97–103)

SARNE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96–03–00678

[Defendant's motion to dismiss is granted.]

(Dated July 24, 1997)

Serko & Simon (Joel K. Simon and *Christopher M. Kane), Wechsler Harwood Halebian & Feffer LLP (Robert I. Harwood* and *Samuel K. Rosen)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Todd Hughes), Richard McManus*, Office of the Chief Counsel for United States Customs Service, *Martin Cohen*, Office of the General Counsel for Army Corps of Engineers, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on defendant's motion to dismiss plaintiff Sarne Corporation's first amended complaint ("complaint") for failure to state a claim upon which relief may be granted pursuant to USCIT R. 12(b)(5). Defendant's motion to dismiss is granted.

FACTUAL BACKGROUND

In 1986, Congress enacted the Water Resources Development Act imposing the Harbor Maintenance Tax ("HMT") on port use, with some exceptions. 26 U.S.C.A. §§ 4461(a),(c)(1)(A) (West Supp. 1997)(tax paid by importer). Receipts collected from the HMT are appropriated from the Treasury's general fund to the Harbor Maintenance Trust Fund ("Trust Fund"). 26 U.S.C.A. § 9505(b)(West Supp. 1997). Money is appropriated out of the Trust Fund as may be necessary to fund up to 100 percent of the eligible operations and maintenance costs assigned to commercial navigation of all harbors in the United States. 33 U.S.C.A. §§ 2238(a)(1),(2)(West Supp. 1997). Currently, there is a surplus of approximately $861,134,000 in the Trust Fund. *Annual Report to Congress On The Status Of The Harbor Maintenance Trust Fund For Fiscal Years 1995 and 1996*, Table 4 (June 23, 1997).

Sarne, a payer of the HMT as an importer, alleges that the large surplus accumulating in the Trust Fund is contrary to the legislative intent of 33 U.S.C.A. §§ 2238(a)(1) and (2), and that the surplus exists because the Army Corps of Engineers ("Corps") failed to adequately ascertain which harbors require maintenance in violation of 33 U.S.C.A. § 2215 (West Supp. 1997).[1] Moreover, Sarne claims that because the government inadequately utilized the Trust Fund, its legitimate expectations as a payer of the tax went unmet and thus it was harmed. At oral argument, Sarne articulated its claim as requiring "the Secretary of the

[1] The court notes that 33 U.S.C. § 2215 does not specifically address the Corp's duty to ascertain which harbors require maintenance. Instead, 33 U.S.C. § 2215 addresses the partial distribution of costs for water resource projects to non-federal interests.

Army to order the Corps to [1] ascertain which harbors need to be dredged or otherwise maintained and [2] request the proper amount of appropriations from Congress needed to complete the maintenance." In addition, Sarne requests that the court either order the Secretary of the Treasury to issue all reports or to account for how the monies in the Trust Fund have been and are being used.[2]

Standard of Review and Jurisdiction

In reviewing a motion to dismiss for failure to state a claim upon which relief may be granted the court considers whether the complaint sets forth facts sufficient to support a claim by assuming "all well-pled factual allegations are true" and construing "all reasonable inferences in favor of the nonmovant." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991).

Congress intended the HMT to be treated as a customs duty for jurisdiction purposes. 26 U.S.C. § 4462(f)(2)(1994). As the matter involves the administration and enforcement of a law providing for revenues from imports and as the remedies under 28 U.S.C. §§ 1581(a)–(h) are manifestly inadequate, Sarne correctly brought this case pursuant to 28 U.S.C. § 1581(i)(4). *See United States Shoe Corp. v. United States*, 114 F.3d 1564, 1570–71 (Fed. Cir. 1997); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

Discussion

A dismissal for failure to state a claim is proper where it appears beyond a doubt that the complaint fails to show that the challenged action "has caused [ ] injury in fact, economic or otherwise." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (ruling that plaintiffs had shown harm and thus had standing to maintain the action). Here, Sarne fails to allege direct harm and is unable to link the averred harm to an identifiable violation of the statute. Sarne stated at oral argument that it is unaware of any problems encountered by ships carrying its goods entering United States ports due to the alleged failure of the Corps to ascertain which ports require maintenance. Nor has Sarne alleged that any specific dredging request by a port which it might wish to use in the future has been turned down by the Corps to its detriment. Sarne also is not alleging harm caused by the Corps' rejection, in violation of law, of a proposal for maintenance submitted by Sarne or another non-federal entity under 33 U.S.C.A. § 2231 (West Supp. 1997). Instead, Sarne's complaint merely asserts the generalized grievance that the current utilization of the Trust Fund does not meet its legitimate expectations; a grievance which does not entitle it to any relief by this court. *See, e.g., Flast v. Cohen*, 392 U.S. 83, 106 (1968)(ruling that federal court is not proper forum for a plaintiff that has not suffered direct harm to air generalized grievances).

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[2] The HMT reports for fiscal years 1995 and 1996 were issued by the Secretary of the Army on July 1, 1997. Thus, this issue is moot.

Giving Sarne leave to amend would serve no purpose, as the acts complained of could not constitute a cognizable claim for relief. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Saint Paul Fire & Marine Ins. Co. v. United States*, 16 CIT 633, 635, 795 F. Supp. 453, 455 (1992), *aff'd*, 16 F.3d 420 (Fed. Cir. 1993). Accordingly, defendant's motion to dismiss is granted.

(Slip Op. 97–104)

LTV STEEL CO., INC., AK STEEL CORP., BETHLEHEM STEEL CORP., GENEVA STEEL, GULF STATES STEEL INC. OF ALABAMA, INLAND STEEL INDUSTRIES, INC., LACLEDE STEEL CO., LUKENS STEEL CO., NATIONAL STEEL CORP., SHARON STEEL CORP., U.S. STEEL GROUP A UNIT OF USX CORP., AND WCI STEEL, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND AG DER DILLINGER HUTTENWERKE, ET AL., DEFENDANT-INTERVENORS

Consolidated Court No. 93–09–00568–CVD

Domestic Producers move for Judgment on the Agency Record pursuant to U.S. CIT R. 56.2, arguing the Department of Commerce's *Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany*, 58 Fed. Reg. 37,315 (Dep't Comm. 1993) (final determ.) *("German Certain Steel Final Determination")* should be reversed and remanded for further consideration.

Thyssen Stahl AG, Thyssen Steel Detroit Company and Thyssen Incorporated (collectively "Thyssen") also move for Judgment on the Agency Record pursuant to U.S. CIT R. 56.2. Thyssen urges this Court to reverse the Department's findings in the *German Certain Steel Final Determination* with respect to the countervailability of benefits provided pursuant to Article 56(2)(b)of the European Coal and Steel Community Treaty and the Aid for Closure of Steel Operations program. Thyssen requests this Court remand this action to the Department with directions to (1) exclude those two programs from the calculation of any countervailing duties, and (2) determine that because any subsidies received by Thyssen were *de minimis*, Thyssen should be excluded from any affirmative countervailing duty determination as to Germany.

Fried. Krupp AG Hoesch Krupp and Krupp Hoesch Stahl AG (collectively "Fried. Krupp") additionally move for Judgment on the Agency Record pursuant to U.S. CIT R. 56.2. Fried. Krupp challenges the Department's *German Certain Steel Final Determination*, arguing Commerce's determination to countervail half of the German government-funded portion of the early retirement aid program provided pursuant to Article 56(2)(b) of the European Coal and Steel Community Treaty as well as Commerce's decision to countervail funds provided under the German government's Aid for the Closure of Steel Operations program is not supported by substantial evidence on the record and is not in accordance with law.

Defendant requests this Court deny the three Motions for Judgment on the Agency Record and sustain Commerce's *German Certain Steel Final Determination*.

Held: The Motions for Judgment on the Agency Record of Domestic Producers, Fried. Krupp and Thyssen are denied. The Court grants defendant's request and will sustain Commerce's *German Certain Steel Determination* in all respects as the Court finds it to be supported by substantial evidence on the record and otherwise in accordance with law.

(Dated July 25, 1997)

Dewey Ballantine (Michael H. Stein, Alan Wm. Wolff, Martha J. Talley, John A. Ragosta, Guy C. Smith, O. Julia Weller, Kristen M. Neller: on brief), *(John A. Ragosta, Guy C.*

Smith: on oral argument); *Skadden, Arps, Slate, Meagher & Flom (John J. Mangan, Robert E. Lighthizer, D. Scott Nance:* on brief), counsel for LTV Steel Company, Incorporated, et al.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(A. David Lafer, Jeffrey M. Telep); Jeffrey C. Lowe,* Attorney-Advisor, Office of Chief Counsel for Import Administration, United States Department of Commerce, counsel for defendant.

Sharretts, Paley, Carter & Blauvelt, P.C. (Gail T. Cumins, Ned H. Marshak, Beatrice A. Brickell), counsel for Thyssen Stahl AG, *et al.; LeBoef, Lamb, Greene & MacRae, L.L.P. (Pierre F. de Ravel d'Esclapon, Mary Patricia Michel),* counsel for AG der Dillinger Hüttenwerke; Hogan & Hartson *(Lewis E. Leibowitz, Steven J. Routh),* counsel for Fried. Krupp AG Hoesch-Krupp, et al.

OPINION

CARMAN, *Chief Judge:* In accordance with a February 18, 1994 scheduling order, and after extensive consultation with the parties and upon their consent, the parties were directed to brief five general issues regarding determinations by the Department of Commerce, International Trade Administration ("ITA") addressing steel products from various countries.[1] The order also set forth a schedule for the parties to submit briefs on country-specific issues raised by the ITA's determinations. In prior opinions, this Court has disposed of all challenges to the five general issues and they are presently on appeal before the United States Court of Appeals for the Federal Circuit. *See British Steel plc v. United States*, 936 F. Supp. 1053 (CIT 1996) *("British Steel IV"); British Steel plc v. United States,* 929 F. Supp. 426 (CIT 1996) *("British Steel III"); British Steel plc v. United States*, 924 F. Supp. 139 (CIT 1996) *("British Steel II"), appeals docketed*, Nos. 96–1401 to –06 (Fed. Cir. June 21, 1996); *British Steel plc v. United States*, 879 F. Supp. 1254 (CIT 1995) *("British Steel I"), appeals docketed*, Nos. 96–1401 to –06 (Fed. Cir. June 21, 1996) (collectively the "*British Steel* cases" or the "general issues opinions"). What remains before this Court, therefore, are the parties' country-specific challenges to Commerce's steel determinations. This opinion will not address the challenges raised in the parties' papers regarding the propriety of Commerce's privatization methodology as this issue has been decided conclusively in the general issues opinions.[2] *See British Steel IV,* 936 F. Supp. at 1065–71; *British Steel I,* 879 F. Supp. at 1285–88. This opinion will address only the German country-specific issues which remain undecided following this Court's issuance of the *British Steel* opinions. While the Court believes this opinion is in no way inconsistent with its prior opinions addressing the general issues, to the extent this opinion is seen to conflict in any way with the Court's general

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[1] The five general issues were: (1) Commerce's use of a 15-year allocation period to determine the benefit from each of the nonrecurring countervailable grants; (2) Commerce's use of a grant methodology to countervail equity infusions into an uncreditworthy company whose shares are not publically traded; (3) Commerce's treatment of privatization and restructuring regarding previously received subsidies, including Commerce's use of a repayment methodology; (4) Commerce's determination of the appropriate sales denominator to be used in subsidy calculations when a respondent's total sales include not only sales of domestically produced merchandise, but also sales of merchandise produced in one or more foreign countries; and (5) Commerce's treatment of disproportionality for the purposes of evaluating the specificity of a potentially countervailable program.

[2] *See also Saarstahl AG v. United States*, Court No. 93–04–00219, Slip Op. 97–67 at 9–14 (CIT May 29, 1997) for a discussion of the privatization general issue.

issues decisions, this Court's findings in the general issues opinions will prevail.

Four Motions for Judgment on the Agency Record were filed in this case challenging the Department of Commerce's ("Department" or "Commerce") *Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany*, 58 Fed. Reg. 37,315 (Dep't Comm. 1993) (final determ.) *("German Certain Steel Final Determination")*. The first motion was filed by AK Steel Corporation, Bethlehem Steel Corporation, Geneva Steel, Gulf States Steel Incorporated of Alabama, Inland Steel Industries, Incorporated, Laclede Steel Company, LTV Steel Company, Incorporated, Lukens Steel Company, National Steel Corporation, Sharon Steel Corporation, U.S. Steel Group a Unit of USX Corporation and WCI Steel, Incorporated (collectively "Domestic Producers" or "Domestics"). In *British Steel IV*, this Court completed its findings with respect to all issues related to privatization raised in the general issues opinions, and thus disposed of the privatization issues involved in this case. *See British Steel IV*, 936 F. Supp. at 1057. In so doing, this Court also addressed one of the four issues contained in the motion filed by Domestic Producers, and entered partial final judgment under U.S. CIT R. 54(b) as to the corresponding counts in the Domestic Producers' complaint.[3] *See id.* at 1071–72. In this opinion, the Court will address the remaining three issues in the Domestic Producers' Motion for Judgment on the Agency Record.

The second Motion for Judgment on the Agency Record was filed by AG der Dillinger Hüttenwerke ("Dillinger"). In *British Steel IV*, this Court addressed in its entirety Dillinger's Motion for Judgment on the Agency Record and entered final judgment as to the complaint filed by Dillinger. *See id* at 1072. As a result, the Court will not address Dillinger's Motion for Judgment on the Agency Record in this opinion.

The third and fourth Motions for Judgment on the Agency Record were filed by Fried. Krupp AG Hoesch-Krupp and Krupp Hoesch Stahl AG (collectively "Fried. Krupp") and Thyssen Stahl AG, Thyssen Steel Detroit Company and Thyssen, Incorporated (collectively "Thyssen").

This Court will address Fried. Krupp's and Thyssen's Motions for Judgment on the Agency Record in their entirety in this opinion, because both of the motions concern country-specific issues which have not been addressed previously by this Court. The Court heard oral argument on the non-privatization issues in this case, and has jurisdiction over this matter under 28 U.S.C. § 1581(c) (1988).

Standard of Review

In reviewing a final determination by Commerce, this Court must sustain the determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is that which "'a reason-

[3] Specifically this Court entered final judgment pursuant to U.S. CIT R. 54(b) as to Counts I, II and III in the Domestic Producers' complaint filed in *LTV Steel Co., Inc, et al. v. United States*, Court No. 93–09–00568–CVD.

able mind might accept as adequate to support a conclusion.'" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951) (citation omitted), *quoted in Matsushita Elec. Indus. Co., Ltd. v. United States*, 3 Fed Cir. (T) 44, 51, 750 F.2d 927, 933 (1984).

The Court must accord substantial weight to the agency's interpretation of a statute it administers. *See American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986). While Commerce has discretion in choosing one interpretation over another, "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368, 106 S.Ct. 681, 686, 88 L.Ed.2d 691 (1986), *cited in Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) ("[T]his Court will not allow an agency, under the guise of lawful discretion, to contravene or ignore the intent of the legislature or the guiding purpose of the statute."), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987). The Court is not to substitute its own determination for the agency's but rather is to determine whether Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law. *See, e.g., Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966) (noting "the possibility of drawing two inconsistent conclusions from the evidence does not permit an administrative agency's finding from being supported by substantial evidence"); *Universal Camera Corp.*, 340 U.S. at 488, 71 S.Ct at 465, 95 L.Ed. at 467–68 (1951) (reviewing court may not "even as to matters not requiring expertise * * * displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*").

BACKGROUND

The countervailing duty determinations at issue in this case involve various grants provided by both the Government of Germany ("GOG") and various regional governments to six steel producers: AG der Dillinger Hüttenwerke ("Dillinger"), Hoesch SG ("Hoesch"), Klöckner Stahl AG ("Klöckner"), Preussag Stahl AG ("Preussag"), Thyssen AG ("Thyssen"), and Walzwerk Ilsenburg ("Ilsenburg") to ease the difficulties brought about by the decline in demand and reduced prices for steel and to reduce the financial hardships associated with plant closings and German reunification in the mid-1970s and 1980s. Commerce determined a variety of different "countervailable subsidies [we]re being provided to manufacturers, producers, or exporters in Germany of certain steel products" under a variety of programs.[4] *German Certain Steel Final Determination*, 58 Fed. Reg. at 37,316. The countervailable subsidies included (1) capital investment grants; (2) structural improvement

[4] The statute provides a countervailable domestic subsidy is a benefit "provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise." 19 U.S.C. § 1677(5)(A)(ii) (1988).

aids; (3) grants to companies investing in certain regions in Germany; (4) assistance to companies in depressed areas; (5) special subsidies for companies located in the zonal border area; (6) nonrecurring grants relating to environmental protection for steel companies investing in the Ruhr region; (7) grants for expenses incurred with respect to displaced employees; and (8) a variety of other grants, assistance, loans and benefits.

Central to Commerce's investigation in this case are its determinations regarding the events in Germany involving Saarstahl Volkingen GmbH ("Saarstahl SVK").[5] Prior to April 1, 1989, two steel companies existed in the Saarland region of Germany: Saarstahl SVK, a producer of long products and AG der Dillinger Hüttenwerke ("Dillinger"), a producer of cut-to-length carbon steel plate. Until 1986, Saarstahl SVK was wholly owned by Arbed Luxembourg ("Arbed"), a Luxembourg state-owned company. Dillinger was owned by Usinor Sacilor, which is owned by the French government.

By 1985, Arbed was no longer able or willing to function as the owner of Saarstahl SVK. Because of the importance of Saarstahl SVK to the regional economy, the Government of the Saarland ("GOS") decided to search for a new owner to replace Arbed. In a complicated transaction culminating on June 30, 1989, Saarstahl SVK was first transformed into a new company known as DHS-Dillinger Hütte Saarstahl AG ("DHS"), and the long-products-producing assets of Saarstahl SVK were then spun off into a newly created subsidiary of DHS known as Saarstahl AG. Simultaneously with the creation of Saarstahl AG, DHS acquired Dillinger as a wholly-owned subsidiary. As a result of these events, DHS became a holding company with two operating subsidiaries, Saarstahl AG and Dillinger, and was owned 70 percent by Usinor Sacilor, 27.5 percent by the GOS and 2.5 percent by Arbed.[6]

As a precondition for this transaction's completion, the GOG and the GOS entered into an agreement concerning the previous assistance received by Saarstahl SVK from the GOG and GOS in accordance with a Restructuring Plan they adopted in 1978 to restore competitiveness to Saarstahl SVK and to create a viable steel industry in the Saarland. Under this agreement, all outstanding repayment obligations for the funds provided to Saarstahl SVK, as well as the additional rights held by both governments for the repayment of the principal on the guaranteed loans, were forgiven and relinquished. At the request of the govern-

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[5] As is also explained below, the events involving Saarstahl SVK are relevant to this case because Saarstahl AG and AG der Dillinger Hüttenwerke, a party in this case, are both subsidiaries of Dillinger Hütte Saarstahl AG. Commerce also relied upon its findings regarding Saarstahl AG in *Final Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From Germany*, 58 Fed. Reg. 6,233 (Dep't Comm. 1993) (final determ.) to support some of its determinations regarding Dillinger in the investigations at issue in this case. *See* Def.'s Mem. in Resp. to Pls' Mots. for J. Upon Agency R. ("Def.'s Br.") at 4.

[6] DHS owned 100 percent of Saarstahl AG and 95 percent of Dillinger. Both Saastahl AG and Dillinger had profit and loss agreements with DHS under which they were to transfer any profits to DHS and DHS was required to assume any losses incurred by Dillinger and Saarstahl AG.

ments, private banks also forgave a portion of the debt owed to them by Saarstahl SVK.[7]

Commerce published notice of the initiation of a countervailing duty investigation of Saarstahl AG on May 8, 1992, based on a petition filed by Inland Steel Bar Company and Bethlehem Steel Corporation against imports of certain hot-rolled lead and bismuth carbon steel products from Germany. Commerce issued its *Preliminary Determination* on September 10, 1992, and found that the debt forgiveness by the GOG and the GOS as well as the debt forgiveness by the private banks constituted countervailable benefits which were provided directly to DHS. *See Preliminary Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From Germany*, 57 Fed. Reg. 42,971 (Dep't Comm. 1992) (prelim. determ.). On January 19, 1993, in its *Final Determination,* Commerce determined because the German governments' forgiveness of Saarstahl SVK's debts was necessary to effect the sale or privatization of Saarstahl SVK, the entire amount of debt-forgiveness directly benefitted Saarstahl SVK's new parent, the then newly-formed DHS, and therefore was a countervailable subsidy to DHS. *See Final Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From Germany*, 58 Fed. Reg. 6,233 (Dep't Comm. 1993) (final determ.)

DISCUSSION

A. *Domestic Producers' Motion for Judgment on the Agency Record:*

Domestic Producers challenge portions of Commerce's *German Certain Steel Final Determination*, arguing it is not supported by substantial evidence on the record and is not otherwise in accordance with law. Domestic Producers raise three country-specific challenges to Commerce's *German Certain Steel Final Determination.*

1. *Commerce's Application of the 0.5 Percent Rule:*

Commerce's policy with respect to countervailable grants is to expense recurring grants in the year of receipt and to allocate nonrecurring grants over the useful life of assets in the industry being investigated. *See General Issues Appendix to Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria*, 58 Fed. Reg. 37,225, 37,226 (Dep't Comm. 1993) *("General Issues Appendix").*[8] In several instances, steel companies that are parties in this case received numerous small non-recurring grants under various subsidy programs in a particular year. In those instances, Commerce elected to expense[9] in the year of receipt, rather than amortize, any nonrecurring grants which constituted less than 0.5 percent of the recipient's net

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[7] For a more extensive background of Saarstahl SVK, *see Saarstahl AG v. United States*, Court No. 93–04–00219, Slip Op. 97–67 at 5–7 (CIT May 29, 1997).

[8] The Department's policy regarding this issue was laid out in the *General Issues Apendix*, and was applicable to this and all of the other final determinations in the steel cases.

[9] When Commerce "expenses" a nonrecurring grant, the agency will allocate the entire amount of the benefit to the year in which it is deemed to be received, rather than allocating it over the useful life of the assets. *See Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comments*, 54 Fed. Reg. 23,366, 23,375 (Dep't Comm. 1989) (to be codified at 19 C.F.R. § 355.49(a)(2)) (*"Proposed Regulations"*).

sales in the year in which the grant or grants were received. This exception to Commerce's normal allocation policy is known as the 0.5 percent test. *See General Issues Appendix,* 58 Fed. Reg. at 37,226–27 (detailing Commerce's policy with respect to the 0.5 percent test); *Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comments*, 54 Fed. Reg. 23,366, 23,384 (Dep't Comm. 1989) (to be codified at 19 C.F.R. § 355.49(a)(3)(i)(A)) *("Proposed Regulations")* (proposing application of 0.5 percent test to grants or equity infusions received under a particular program during a year where the total amount of all grants or infusions is less than 0.5 percent of total sales).[10] Commerce's *Proposed Regulations* explain its policy with respect to grants, and is intended "to avoid any anomalies caused by the interaction of the Department's allocation formula and the *de minimis* rule contained in § 355.7 of the Commerce Regulations." *Proposed Regulations*, 54 Fed. Reg. at 23,376 (citation omitted).[11]

In exercising this exception to its normal allocation policy, Commerce rejected an alternative approach advocated by Domestic Producers to aggregate the benefits provided by the various grant programs before determining whether the total amount of grants received exceeds 0.5 percent of total sales. Commerce determined that its program-specific approach to the 0.5 percent test was consistent with its overall countervailing duty methodology and did not result in disparate or otherwise unfair treatment. Commerce explained

> We have decided to continue to apply th[e 0.5 percent] test on a program-by program basis rather than applying the test against the aggregate amount of benefits received under all programs. We determine that this is consistent with our general practice of analyzing the nature of a benefit within the limits of a particular program rather than in the context of every program under investigation.

General Issues Appendix, 58 Fed. Reg. 37,226. Addressing objections that Commerce's policy could allow foreign governments to circumvent the law by providing multiple small subsidies rather than a single large subsidiy, Commerce explained "[e]ach determination of countervailability and each benefit calculation by the Department, is made on a program-specific basis", therefore, "it is appropriate to apply the 0.50 percent test on the same basis." *Id.* at 37,228.

Domestic Producers assert they "do not take issue with the Department's determination not to allocate over time nonrecurring programs falling below a certain threshold level." (Domestic Producers' Mem. in Supp. of Mot. for J. Upon Agency R. ("Domestics' Br.") at 25.) Domestic Producers argue, however, Commerce's failure to apply the 0.5 percent

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[10] In 1989, Commerce published *Proposed Regulations* addressing both the valuation of subsidies and the identification and measurement of foreign government programs most frequently encountered by the Department.

[11] Under the *de minimis* rule, Commerce will "disregard any aggregate net subsidy that [it] determines is less than 0.5% *ad valorem [(i.e., de minimis)]*, or the equivalent specific rate." 19 C.F.R. § 355.7 (1994). The purpose of applying the *de minimis* rule is to determine whether the total benefit subject to countervailability in a given year, whether expensed in that year or amortized from a prior year, is of sufficient magnitude to warrant imposition of a countervailing duty. This rule is distinct from the 0.5 percent test at issue in this case.

test to the sum of grants received under all programs in a given year is not supported by substantial evidence on the record, is fundamentally flawed and is contrary to law. Domestic Producers maintain "[i]n previous determinations, the Department ha[s] instead expensed only those grants which, *together with all other grants received in the same year,* constituted less than 0.5 percent of the recipient's net sales in the year of receipt." *(Id.* at 8 (footnote omitted).) Domestics assert, therefore, Commerce erred when it "failed to explain its decision to apply the 0.5 percent allocation test to grants received under individual programs, rather than—as in previous cases—to all grants received under all programs." *(Id.* at 11–12.) Domestics add "[m]oreover, even if the Department had explained this change, its new policy leads to absurd results and is inconsistent with the statute that the Department is entrusted with enforcing." *(Id.* at 12.)

Domestics point to the different methodology followed by Commerce in a 1984 countervailing duty case, where Commerce determined to "'total *all* grants. If the sum is less the [sic] .5 percent of all sales * * * we will allocate such grants only to the year of receipt.'" (Domestics' Br. at 28–29 (quoting *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina: Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 49 Fed. Reg. 18,006, 18,018 (Dep't Comm. 1984) (final determ.) (emphasis added by Domestic Producers).) Domestic Producers point to another case where Commerce combined subsidies received by Korean firms under two different programs before applying 0.5 percent test, stating it would "'compare the sum of *all* grants received *in any given year* with 0.5 percent of total sales.'" (Domestics' Br. at 29 (quoting *Final Affirmative Countervailing Duty Determination; Cold-Rolled Carbon Steel Flat-Rolled Products From Korea; and Final Negative Countervailing Duty Determination; Carbon Steel Structural Shapes From Korea*; 49 Fed. Reg. 47,284, 47,288 (Dep't Comm. 1984) (final determ.) (emphasis added by Domestic Producers)).) Domestics additionally cite other cases in which Commerce aggregated grants received under two different programs before applying the 0.5 percent test and expensed each of the grants because their sum did not exceed 0.5 percent of sales in the year of receipt. *(See* Domestics' Br. at 30 (citing *Stainless Steel Plate From the United Kingdom; Preliminary Results of Countervailing Duty Administrative Review,* 51 Fed. Reg. 34,112, 34,114 (Dep't Comm. 1986)).) Domestics conclude "[i]t is the perpetuation of this departure from past practice without adequate explanation that constitutes the agency's error." (Domestics' Br. at 34.)

Domestics additionally argue Commerce's rationale for changing its policy and for "applying the 0.5 percent test on a program-by-program basis in this proceeding does not bear close scrutiny" because Commerce "cannot hide the fact that it has, at bottom, no reason for applying the 0.5 percent test to individual programs." *(Id.* at 34, 35.) Domestics assert there are "numerous reasons for applying the test to the aggregate amount of benefits received under all programs." *(Id.* at 36.) Do-

mestics argue if Commerce had applied the 0.5 percent test as they urged, there would have been "a difference in the overall subsidy rates applicable to two of the respondents." *(Id.)*[12]

Finally, Domestic Producers contend "[t]he incentives [for foreign governments] to alter the form of the subsidies provided by the application of this methodology on a program-by-program basis are undeniable." *(Id.* at 37.) Domestics explain "[t]he Department's application of the rule on a program-by-program basis also yields the absurd result whereby a heavily subsidized company can effectively avoid countervailing duties simply by receiving numerous small grants, none of which individually exceed 0.50 percent of its total sales." *(Id.* at 43.) Domestics add "[a] foreign government would be able to minimize the countervailability of a grant by dividing it into many small grants under different program labels, thereby adopting a 'watering can' approach to subsidies." *(Id.)*

Defendant responds by arguing Commerce's application of the 0.5 percent test is "reasonable and based upon substantial evidence in the record as applied to the facts of these cases." (Def.'s Mem. In Resp. to Pls.' Mots. for J. Upon the Admin. R. ("Def.'s Br.") at 93.) Defendant asserts while Domestic Producers' proposal is not unreasonable, "in order to be consistent with its overall CVD methodology and because no party has demonstrated that Commerce's approach results in disparate or otherwise unfair treatment, Commerce has chosen to apply the test on a program-specific basis." *(Id.)* Defendant contends Commerce adequately explained its reason for adopting the program-specific approach in its countervailing duty determinations, the *Proposed Regulations* and the *General Issues Appendix*.

Defendant contends while its earlier practice of applying the test on the basis of aggregating the grants received under all programs in a particular year was "not necessarily an unreasonable approach", "even as early as 1984, Commerce periodically began applying the 0.50 percent test on a program-by-program basis, and has done so consistently since 1989 when it formally adopted that approach in its proposed regulations." *(Id.* at 94 (citing *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Lamb Meat from New Zealand*, 50 Fed. Reg. 37,708, 37,710 (Dep't Comm. 1985); *Galvanized Carbon Steel Sheets From Australia: Final Negative Countervailing Duty Determination,* 49 Fed. Reg. 29,998, 29,999 (Dep't Comm. 1984).) Defendant emphasizes since the *Proposed Regulations* were adopted, "Commerce has applied the 0.50 percent test on a program-specific basis in *every determination it has reached*, including all the investigations involving certain steel products." (Def.'s Br. at 94–95 (footnote omitted) (citing *Preliminary Affirmative Countervailing Duty Determination: Certain Carbon Steel Butt-Weld Pipe Fittings From Israel*, 59 Fed. Reg. 28,340, 28,341 (Dep't Comm. 1994); *Final Affirmative Countervailing*

[12] Defendant asserts Domestic Producers, however, "cannot point to how the margin of any particular respondent was affected." (Def.'s Br. at 101 n.60.)

Duty Determination: Fresh and Chilled Atlantic Salmon From Norway, 56 Fed. Reg. 7,678 (Dep't Comm. 1991)).)

Defendant observes Commerce expressly rejected the aggregate approach and explained its reasons for adopting the program-specific approach in the *General Issues Appendix*. The Department explained

> In our investigations, we analyze benefits on a program-by-program basis. Each determination of countervailability and each benefit calculation by the Department, is made on a program-specific basis. Therefore, we have determined that it is appropriate to apply the 0.50 percent test on the same basis. In addition, we disagree with petitioners that the current 0.50 percent test has resulted in anomalies in the administration of the CVD law. Despite the extended period of time during which we have applied the 0.50 percent test on a program basis, petitioners have been unable to cite even one instance in which firms were treated differently, or in which foreign governments attempted to circumvent the CVD law through use of the Department's 0.50 percent test. In summary, nothing petitioners have argued leads us to conclude that we should alter the current 0.50 percent test.

General Issues Appendix, 58 Fed. Reg. at 37,228. Defendant argues "[i]n effect, whether the subsidy in question is a grant, loan, equity infusion, rebate, or whatever, Commerce *always* determines countervailability and calculates the benefit on a program-specific basis." (Def.'s Br. at 99.)

Defendant also asserts Commerce's application of the 0.5 percent test "in a manner which is consistent with Commerce's overall approach to CVD law also prevents Commerce from having to allocate very small benefits over the useful lifetime of assets." *(Id.* at 100.) Defendant argues its policy is consistent with the original purpose behind the 0.5 percent test—to insure the allocation/expense rule would be consistent with Commerce's *de minimis* threshold. Defendant concludes "besides being completely unsupported in the record, [Domestic Producers'] claim that foreign governments may take advantage of Commerce's approach to the 0.50 percent test by circumventing the countervailing duty law does not make political or economic sense." *(Id.* at 102.)[13]

Finally, Thyssen argues Commerce's "application * * * of its well-settled practice of not allocating nonrecurring grants over the useful life

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[13] Domestic Producers argue Commerce's policy is inconsistent with the *de minimis* threshold, which is also 0.5 percent. *See supra*, note 11. Domestic Producers assert Commerce's policy could result in a more heavily subsidized company (receiving 10 grants of 0.45 percent of its total sales) escaping countervailing duties because of amortization, while a less subsidized company (receiving one grant of 4.5 percent of its total sales) is countervailed. Domestic Producers assert this would result if amortization of the subsidy benefit caused the total benefits during the review year to fall below 0.5 percent of a producer's total sales in the review year, in which case Commerce would consider the review year benefit to be *de minimis* and not countervailable. (Domestics' Br. at 38–39.)

Defendant, however, responds that

> [i]t is as least as possible that [Domestic Producers'] proposed approach could result in a relatively heavily subsidized company not being countervailed at all. For instance, assume that during the period of investigation ("POI") a steel company received three non-recurring, countervailable grants under three separate subsidy programs, each of which totaled 0.30 percent of its sales. Applying [Domestic Producers'] proposal, these three grants would be aggregated, bringing the total to over 0.50 percent of the company's sales and thus requiring that they be allocated over fifteen years. If these were the only grants received by the company, the result would be a *de minimis* margin and no CVD order would be issued. On the other hand, applying Commerce's program-specific policy, because these three grants were received during the POI, each would be expensed. The total would exceed 0.50 percent of total sales, thus surpassing the *de minimis* threshold and insuring that an order would be issued.

(Def.'s Br. at 102 (citations omitted).)

of assets where the sum of the grants provided under a particular program in a given year is less than 0.50 percent of a firm's total sales in that year was both reasonable and fully in accordance with the CVD law." (Thyssen's Br. in Opp'n to Domestics' Mot. for J. On Agency R ("Thyssen's Opp'n Br." at 1.) Thyssen therefore asks this Court to sustain the Department's application of the 0.5 percent rule on a program-specific basis.

This Court finds Commerce's determination to expense in the year of receipt the benefits associated with any nonrecurring grant which constitutes less than 0.5 percent of the recipient's net sales in the year the grant or grants are received is supported by substantial evidence on the record and is otherwise in accordance with law. This Court recognizes Domestic Producers' argument that in several previous determinations the Department expensed only those grants which, together with all other grants received in the same year, constituted less than 0.5 percent of the recipient's net sales in the year of receipt. However, this Court also notes that even in several cases decided contemporaneously with the cases cited by Domestic Producers, Commerce applied the 0.5 percent test on a program-by-program basis. Moreover, Commerce has applied the 0.5 percent test on a program-specific basis since Commerce formally adopted a program-specific approach in the *Proposed Regulations* in 1989. *See Final Affirmative Countervailing Duty Determination; Oil Country Tubular Goods from Canada*, 51 Fed. Reg. 15,037 (Dep't Comm. 1986); *Final Affirmative Countervailing Duty Determination; Lamb Meat from New* Zealand, 50 Fed. Reg. 37,308 (Dep't Comm. 1985); *Final Negative Countervailing Duty Determination; Galvanized Carbon Steel Sheets from Australia*, 49 Fed. Reg. 29,998 (Dep't Comm. 1984). This Court notes Domestic Producers' argument the program-specific approach will lead to circumvention of the countervailing duty laws, but finds Domestic Producers have not demonstrated examples of such practice. This Court further notes the Department has a variety of available options to deal with circumvention, should the need occur.

This Court additionally recognizes the methodology set forth in the *Proposed Regulations*, which applies the 0.5 percent test to "grants or equity infusions received *under a particular program* during a year." *Proposed Regulations*, 54 Fed. Reg. at 23,384 (to be codified at 19 C.F.R. § 355.49(a)(3)(i)) (emphasis added). Commerce further emphasized its practice in the *General Issues Appendix* when it explained its policy of amortizing nonrecurring grants "unless the sum of grants provided *under a particular program*" is less than 0.50 percent of a firm's total sales. *General Issues Appendix*, 58 Fed. Reg. at 37,226 (emphasis added). This Court observes both the *Proposed Regulations* and the *General Issues Appendix* address grants received *under a particular* program, and finds the language of both the *Proposed Regulations* and the *General Issues Appendix* supports Commerce's determination.

This Court also notes Commerce explained its rationale for applying the program-specific approach and said, for example, that applying the 0.5 percent test on a program-by-program basis "is consistent with [Commerce's] general practice of analyzing the nature of a benefit within the limits of a particular program rather than in the context of every program under investigation." *General Issues Appendix*, 58 Fed. Reg. at 37,226. This Court recognizes there are competing interests at stake in this case which advocate the adoption of different approaches, but notes the methodology selected by Commerce is reasonable and, as defendant points out, "need not be the most reasonable approach nor the one the Court might itself favor." (Def.'s Br. at 98.) "[T]he grant of discretionary authority to an agency implies that the exercise of discretion be predicated upon a judgment anchored in the language and spirit of the relevant statutes and regulations." *Freeport Minerals Company (Freeport-McMoran, Inc.) v. United States*, 4 Fed. Cir. (T) 16, 18, 776 F. 2d 1029, 1032 (1985). This Court finds Commerce's choice of a program-specific approach is a reasonable interpretation of the countervailing duty laws and is supported by substantial evidence on the record and is otherwise in accordance with law.[14]

2. *Choice of the Benchmark Interest Rate:*

In its *Preliminary Determination* in this matter, Commerce used the German "Lending Rate" published by the International Monetary Fund ("IMF") in *International Financial Statistics* as the discount rate and as the benchmark interest rate for long-term fixed-rate loans.[15] The GOG objected to the use of the IMF "Lending Rate" and argued instead the rate for 10-year mortgages on residential lots should have been used as the discount rate, or alternatively, a different IMF "Lending Rate" should have been used, such as one applicable to loans of between DM 1 million and DM 5 million, since most of the loans at issue exceeded DM 1 million.

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[14] This Court notes the Department's position has remained consistent since the issuance of the *Proposed Regulations* in 1989. In the Department's proposed rules to conform the Department's existing countervailing duty regulations to the Uruguay Round Agreements Act, which implemented the results of the Uruguay Round multilateral trade negotiations, the Department indicated it would "retain[ ] (with some stylistic changes) the so-called 0.50 percent test." *Countervailing Duties; Proposed Rule*, 62 Fed. Reg. 8,818, 8,826 (Dep't Comm. 1997). The Department further indicated it considered the test

> to be an important part of its efforts to simplify CVD proceedings and to reduce the burdens on all parties involved. By expensing small non-recurring grants to the year of receipt, the Department avoids the need to: (1) Collect, analyze, and verify the data needed to allocate such grants over time; and (2) keep track of the allocation calculations for minuscule subsidies from year to year.

Id. The Department did address one of the concerns advocated by Domestic Producers in this case—that foreign governments could evade countervailing duties by awarding small benefits under numerous programs—and indicated the Secretary would "normally" expense nonrecurring grants received under a program if the grants are less than 0.5 percent. The Department stated

> although we intend to continue to apply the 0.5 percent rule on a program basis, we have given ourselves the flexibility to take a different approach in situations where petitioners are able to point to clear evidence that the foreign government has deliberately structured its subsidy programs so as to reduce the exposure of its exporters to countervailing duties.

Id.

[15] During oral argument in this case, counsel for LTV Steel explained that

> the idea behind the benchmark selection is to come up with * * * a benchmark rate the Respondent could have obtained through private channels absent the subsidy. It's designed to be a reasonably accurate approximation of the cost of the money for the firms in question absent any subsidized lending. * * * [I]t has to be approximately the rate that a reasonable banker would have been willing to lend during the period.

Oral Arg. Tr. at 119–120. The Court further added that if there is no market rate available, a constructive value is used.

In the *German Certain Steel Final Determination*, Commerce determined "the average preferred benchmark in this case is the rate for industrial bonds in Germany as published by the Deutsche Bundesbank." *German Certain Steel Final Determination*, 58 Fed. Reg. at 37,322. Commerce explained its aim was to "obtain an objective measure of the company's long-term (rather than short-term) borrowing ability", and its "practice, as stated in section 355.44(b)(4) of the Proposed Regulations, sets out a hierarchy for selecting long-term interest rate benchmarks." *Id.* Commerce explained:

> [t]he most preferred options are (1) the interest rate the company under investigation pays for long-term loans, (2) the interest rate the company under investigation pays on debt obligations, *i.e.*, bonds, and (3) the variable rate the company under investigation pays for long-term loans. The next preferred option is the national average long-term interest rate in the country in question. The fact that the benchmark hierarchy does not specify either long-term loan rates or bond rates indicates that either is preferable to a long-term variable rate or a short-term rate.

Id. Commerce stated it endeavored in this case to "use[ ], whenever possible, each company's actual cost for long-term, fixed-rate debt" as the discount rate. *Id.* at 37,316. Commerce further explained, "[i]f a company did not report this cost, or when a company had no long-term borrowing in a year in which a grant was approved, we used the rates for industrial bonds provided for by the Deutsche Bundesbank" because that rate most accurately reflected the national average long-term fixed interest rate in Germany. *Id.*

Domestic Producers argue Commerce's use of the industrial bond rate published by the Deutsche Bundesbank when it lacked company-specific benchmark information was "wholly devoid of any record support" because it was not a reasonable reflection of the national average long-term interest rate, was a rate which "no party had advocated in its brief" and was "*lower* than any benchmark rate advocated by the respondent German steel producers." (Domestics' Br. at 10, 46) Domestic Producers further argue "[w]hile the Department is not required to adopt the positions advocated by the parties, and while the Department has considerable latitude in this regard, it may not, without record support for its choice, arbitrarily select an interest rate." *(Id.* at 48.) Domestics argue Commerce correctly used the German "Lending Rate" published by the IMF as the long-term benchmark interest rate and discount rate in the *Preliminary Determination*, and assert Commerce did not articulate in the *German Certain Steel Final Determination* why the rates on industrial bonds provided by the Deutsche Bundesbank were a more appropriate benchmark interest rate.

Domestics also maintain defendant and Thyssen "completely overlook the principle underlying the 'hierarchy' in the Proposed Regulations * * * [which is] to approximate the interest rate that a company would pay for a comparable loan on market terms." (Domestics' Reply at 21.) Domestics assert Commerce "cannot rigidly follow the hierarchy of

its Proposed Regulations when to do so would contravene its own prior practice and the fundamental purpose underlying the selection of benchmark rates." *(Id.* at 23.)

Domestics additionally assert Commerce's standard in selecting an appropriate discount rate has been whether loans at that rate were commercially available to the respondent. (Domestics' Reply at 22 (citing *Oil Country Tubular Goods from Argentina*; *Final Results of Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 38,116, 38,118 (Dep't Comm. 1991) (Commerce rejected certain interest rates that did "not reflect the predominant commercial alternative source of credit" or were "not available to businesses" in the year in question in calculating benchmark interest rates); *Final Affirmative Countervailing Duty Determination; Certain Fresh Atlantic Groundfish From Canada*, 51 Fed. Reg. 10,041, 10,063 (Dep't Comm. 1986) (Commerce used short-term loans as benchmark because no commercially available long-term loans were found)).) Domestics argue the Department's claim that the commercial availability of loans or bonds is not the standard for determining whether Commerce may rely on a particular rate as a benchmark is "belied" by agency practice. Domestics argue, contrary to the government's assertions, the industrial bond rates selected by Commerce did not meet this standard of commercial availability. Domestics argue

> [t]he Department has not shown how the industrial bond rate provided by the Deutsche Bundesbank is comparable to the interest rate that the subject steel companies would have had to pay for capital investment funds or long-term loans on terms that were not 'inconsistent with commercial considerations.' Without such supporting evidence, the Department's determination cannot stand.

(Domestics' Br. at 48 (footnote omitted).) Domestics request this Court remand Commerce's selection of the industrial bond rate with instructions to Commerce to determine a benchmark interest rate for long-term fixed rate loans and a discount rate that is consistent with record evidence and that reflects the national average long-term interest rate.

In responding to the arguments raised by the Domestic Producers, defendant argues Commerce "reasonably rejected several alternative rates", such as the German "Lending Rate" published by the IMF, and "reasonably relied upon the industrial bond rates published by the Deutsche Bundesbank as the discount rate applicable to non-recurring grants and the benchmark interest rate for long-term loans to calculate the benefit from the various subsidies in the underlying investigations." (Def.'s Br. at 106.)

First, defendant asserts Commerce adhered as closely as possible to its established practice in relying upon company-specific information whenever possible and in following its hierarchy of preferring to rely upon, absent a company-specific benchmark, the "national average long-term rate, either for loans or bonds," rather than short-term rates. *German Certain Steel Final Determination*, 58 Fed. Reg. at 37,323; *see also Proposed Regulations*, 54 Fed. Reg. at 23,380 (to be codified at 19

C.F.R. § 355.44(b)(4)) (setting out hierarchy for selecting the benchmark interest rate). Defendant asserts Commerce considered all available alternatives and determined the Deutsche Bundesbank industrial long-term bond rate most reasonably reflected the national average long-term, fixed interest rate in Germany. (Def.'s Br. at 106–07.)

Second, defendant argues the IMF rate is a short-term rather than a long-term interest rate, and since Commerce "only relies upon short-term interest rates as a last resort", the long-term Bundesbank rate "was clearly preferable to the short-term IMF rate." *(Id.* at 107.) Defendant asserts "because Commerce relied upon a reasonable benchmark which was more in accordance with the agency's practice, there was no need for Commerce to resort to the IMF short-term rate." *(Id.)*

Finally, defendant argues Domestic Producers "assert[ ] incorrectly that Commerce's 'standard in selecting an appropriate discount rate has been whether the rates are commercially available,' and Commerce was therefore precluded from relying upon the Deutsche Bundesbank rate because the market for industrial bonds was not very active." *(Id.* at 107–08.) Defendant maintains the commercial availability of loans or bonds is not the standard for determining whether Commerce may rely upon a particular rate as a benchmark.[16] Rather, defendant contends, "the proper standard is set out in Commerce's proposed regulations and requires only that Commerce select a reasonable benchmark in accordance with its hierarchy of preferences." *(Id.* at 108.)

Thyssen additionally argues the Department's selection of the yields on industrial bonds published by the Deutche Bundesbank as the benchmark interest rate was supported by record evidence and was consistent with the established methodology for selecting the benchmark interest rate. Thyssen maintains the Department "articulated a reasonable explanation in the Final Determination, which is wholly consistent with the 1989 Proposed Regulations, for its use of the Deutsche Bundesbank industrial bond rates as representative of national long-term interest rates in Germany." (Thyseen's Opp'n Br. at 4.) Thyssen also points out the Department explained the industrial bond rates published by the Deutsche Bundesbank were "very similar" and "consistent with" the bond rates offered by one of the respondent steel companies, Hoesch. Thyssen contends "[t]he mere fact that [Domestic Producers] are dissatisfied with the Department's choice of the long-term benchmark provides no basis for the [Domestic Producers'] request that this Court reverse the Department's otherwise reasonable and lawful decision." *(Id.* at 4–5.) Thyssen, therefore, argues this Court should affirm that aspect of the Department's *German Certain Steel Final Determination.*

This Court finds Commerce's selection of the rate for industrial bonds in Germany as published by the Deutsche Bundesbank as the benchmark interest rate in this case is a reasonable reflection of the national

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[16] Defendant adds that even assuming commercial availability were the standard, Commerce found that the Deutsche Bundesbank industrial bonds were commercially available and that rate was reasonably comparable to other market rates. *(See* Def.'s Br. at 108.)

long-term interest rate and is supported by substantial evidence and is otherwise in accordance with law. Commerce correctly followed the hierarchy for selecting a benchmark interest rate that is established in § 355.44(b)(4) of the *Proposed Regulations* and chose not to utilize the IMF rate in the *German Certain Steel Final Determination* because it was a short-term rate. This Court notes Commerce's statement that "[t]he fact that the benchmark hierarchy does not specify either long-term loan rates or bond rates indicates either is preferable to a long-term variable rate or a short-term rate", *German Certain Steel Final Determination*, 58 Fed. Reg. at 37,322, and finds this statement to be a reasonable interpretation of the regulations. As Commerce noted, the Department's aim is to obtain an objective measure of the company's long-term borrowing ability and Commerce explained it chose a rate in the *Final Determination* which more closely approximated the actual lending rates available in Germany.

This Court also notes Commerce further explained that during verification, it "examined the yields on 'industrial bonds' published by the Deutsche Bundesbank. Similar to the mortgage-based rates suggested by the GOG, the yields on industrial bonds reflect the cost of secured long-term borrowing." *Id.* at 37,323. This Court must review Commerce's selection of the a benchmark interest rate to determine whether or not it is supported by substantial evidence and is otherwise in accordance with law. This Court finds Commerce reasonably took into account the potential alternative interest rates and reasonably determined the Deutche Bundesbank industrial long-term bond rate was the most accurate reflection of the national average long-term fixed industrial rate in Germany. Therefore, this Court sustains Commerce's determination on this issue, finding it to be supported by substantial evidence on the record and otherwise in accordance with law.

3. *Treatment of a Portion of Ilsenburg's Joint Scheme Grant as a Short-Term Loan:*

Commerce investigated and found countervailable grants provided under a program entitled "Joint Scheme for the Improvement of Regional Economic Structures" which had the primary goal of "assist[ing] companies in depressed areas" where the level of unemployment was higher than the national average. *German Certain Steel Final Determination,* 58 Fed. Reg. at 37,317. Under the program, which was planned and financed by the GOG and state governments and implemented by the states, companies were eligible for grants equal to ten to twenty-three percent of their fixed investments, depending on the location and type of investment. Commerce determined the program was limited to enterprises or industries located in specific geographical regions and concluded "federal assistance provided under this program is specific and, therefore, countervailable." *Id.* Commerce also determined "state assistance under this program in all but the former GDR states * * * is specific and countervailable." *Id.*

One of the German steel companies determined to have received nonrecurring grants under this program was Ilsenburg. Commerce found Ilsenburg, which was located in the former German Democratic Republic, "made one investment eligible for a grant prior to the currency unification", which "subsequently was revalued and written down by company auditors to reflect the effects of the currency unification." *Id.* at 37,318. According to Commerce, internal revenue auditors "advised [Ilsenburg] that it w[ould] be required to repay a part of the grant. The company is also liable for interest on the amount to be repaid." *Id.* Commerce determined that before calculating the grant benefit, it was reasonable to deduct the amount Ilsenburg would be required to repay, and to "treat [ ] the amount outstanding during the period of investigation as a short-term loan with an interest rate of six percent", which was the amount charged by the German governments for repayment of the grant. *Preliminary Determination*, 57 Fed. Reg. at 57,775. Commerce reasoned Ilsenburg would not be able to enjoy the full benefit of the grants and, therefore, it would not be appropriate to countervail the full value of the grants. Commerce responded to Ilsenburg's protest of the repayment claim stating:

> As a result of an audit by the government, Ilsenburg will be required to repay a portion of grants received under the joint scheme program. During verification, we noted that the repayment dates had not yet been determined because Ilsenburg was challenging the finding of the tax office. However, also during verification, we met with an auditor from the German tax office who indicated that a repayment nevertheless would be required, and that a repayment schedule should be set soon.
>
> Because Ilsenburg will be required to repay a portion of the grants received with interest, we have continued to treat this portion of the grant as a contingent liability, and have continued to adjust the amount of the grant for purposes of the benefit calculation. To do otherwise, as petitioners suggest, would lead to overcountervailing in the (likely) event of repayment.

German Certain Steel Final Determination, 58 Fed. Reg. at 37,324.

Domestic Producers assert Commerce's finding "a portion of the grant received by Ilsenburg should be treated as a short-term loan because it was 'repayable' is not supported by the record." (Domestics' Br. at 12.) Rather, Domestic Producers argue, Commerce's reasoning "does not bear scrutiny" because the program was never intended to be conditionally repayable. *(Id.* at 49.) Domestic Producers explain, as a general rule, countervailable subsidies are considered "received" as of the time the actual benefit is received.[17] Domestic Producers assert at the time the grants were received, "no such repayment had been effectuated or

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[17] The *Proposed Regulations* state

> Ordinarily, the Secretary will deem a countervailable benefit to be received at the time that there is a cash flow effect on the firm receiving the benefit. The cash flow and economic effect of a benefit normally occurs when a firm experiences a difference in cash flows, either in the payments it receives or the outlays it makes, as a result of its receipt of the benefit.

Proposed Regulations, 54 Fed. Reg. at 23,384 (to be codified at 19 C.F.R. § 355.48(a)).

even scheduled." *(Id.* at 12.) Domestic Producers conclude, "the grant must be considered by the Department to be a countervailable grant in its entirety, unless repayment by Ilsenburg is actually effected", and "there is no concrete record evidence to support the agency's conclusion that * * * repayment is likely to occur." (Domestics' Reply at 31, 32.) Domestic Producers argue "[t]here was nothing in the record to suggest that Ilsenburg had failed to qualify for the grant *ab initio*. The change in currency value was not an event foreseeable under the program and the request for repayment does not, by itself, turn the program into a conditionally repayable grant scheme." (Domestics' Br. at 50.)

Domestic Producers assert the Department treated the portion of the grant as if it had already been repaid even though it has not been repaid and "may *never* be repaid." *(Id.)* Domestic Producers maintain this grant is clearly distinguishable from grants received under the Aid for Closure of Steel Operation Program, where grants found to be repayable by German tax authorities and already repaid were also deducted from the total amount of the grants received before being amortized. The difference, Domestic Producers explain, is that Ilsenburg is challenging the repayment request, and repayment dates had not even been set at the time of verification. If Ilsenburg wins its challenge of the tax authorities' determination, Domestic Producers continue to explain, "the Department's decision to treat that portion of the grant as repayable with a six percent interest rate will have significantly underestimated the benefit of the subsidy received" because Ilsenburg will have benefitted from the entire amount of the grant and will have been countervailed only to the extent of the difference between the six percent interest rate and the applicable short-term benchmark interest rate. *(Id.* at 51.) Domestic Producers conclude this would be inconsistent with the countervailing duty laws' requirement that subsidies be countervailed to the extent of the benefits provided. As a result, Domestic Producers request this Court remand this issue with instructions that the Department countervail the entire amount of the grant.

Defendant responds by arguing Commerce "reasonably treated the repayable portion of the grants received by Ilsenburg under the Joint Scheme as a short-term, below market rate loan." (Def.'s Br. at 21.) Defendant asserts "[t]he record demonstrates that Commerce had a reasonable basis to conclude that Ilsenburg would be required to repay a portion of the grant because Ilsenburg's eligible investment had been revalued." *(Id.)* Defendant maintains "[e]ven though the repayment had not yet occurred, Commerce reasoned that the evidence supported the determination that it would occur and to have treated that portion as a grant would have led to 'overcountervailing in the (likely) event of repayment.'" *(Id.* at 110 (citation omitted).)

Defendant argues Commerce, after considering Domestic Producers' argument,

> was faced with a choice. For Commerce to have adopted [Domestic Producers'] position, however, would have meant ignoring the evi-

> dence in the record demonstrating Ilsenburg would almost certainly be required to repay a portion of the grant. *By contrast, Commerce's determination took account of the entire record, "including the body of evidence opposed to the [agency's] view."*

(Def.'s Br. at 112–13 (citation omitted) (emphasis added).) Defendant concludes the routine nature of the auditing procedure reduced Ilsenburg's chance of prevailing upon its complaint and it was therefore reasonable for Commerce to conclude Ilsenburg would be required to repay the amount due.

This Court notes defendant's explanation that "in considering the possibility that Ilsenburg might prevail in its effort to avoid repaying the money, Commerce analysts spoke at verification with the independent government tax auditor, who had reviewed Ilsenburg's own devaluation of its investment." *(Id.* at 113.) Defendant adds "[t]his individual indicated with a strong degree of certainty that although Ilsenburg had not yet begun repayment, it would be required to do so soon." *(Id.)* This Court also notes defendant's explanation that Commerce officials also spoke with German government officials who explained that throughout Germany "[i]t is standard procedure for grants received under this program to be audited." *(Id.* (citation omitted).) Defendant also stated "[i]n fact, audits of this type are common for many of the steel subsidies provided in Germany during the period of investigation." *(Id.* at 114.) This Court finds Commerce's determination that Ilsenburg would be required to repay the amount due, after Commerce took account of the entire record, is supported by substantial evidence on the record. This Court therefore holds Commerce properly treated that portion of the grant received by Ilsenburg as a short-term loan.

B. *Thyssen's Motion for Judgment on the Agency Record:*

Thyssen Stahl AG, Thyssen Steel Detroit Company and Thyssen Incorporated (collectively "Thyssen"), plaintiffs in this matter whose case was consolidated under *LTV Steel Co., Inc., et al. v. United States*, Court No. 93–09–00568–CVD, urge this Court to reverse the Department's *German Certain Steel Final Determination* with respect to its decision to countervail benefits provided by Article 56(2)(b) of the European Coal and Steel Community Treaty ("ECSC Treaty") and the Aid for Closure of Steel Operations programs and remand this action to the Department with directions that the Department "(1) exclude those two programs from the calculation of any countervailing duties, and (2) determine that because any subsidies received by Thyssen were *de minimis*[,] Thyssen should be excluded from any affirmative countervailing duty determination as to Germany." (Thyssen's Mot. for J. on Agency R. at 1.) Thyssen indicates the basis of its claims is set forth in the brief filed with this Court by Fried. Krupp. Thyssen states "[t]o avoid burdening this Court with redundant Briefs, the two German plaintiffs, Fried Krupp and Thyssen, decided that Fried Krupp would file substantive briefs in this litigation, while Thyssen would file summary statements

concurring in Fried Krupp's arguments." (Thyssen's Reply Br. at 2 n.1.) This Court accordingly turns to Fried. Krupp's motion.

C. *Fried. Krupp's Motion for Judgment on the Agency Record:*

Fried. Krupp AG Hoesch Krupp and Krupp Hoesch Stahl AG (collectively "Fried. Krupp"), plaintiffs in this matter whose case was also consolidated under *LTV Steel Co., Inc., et al. v. United States*, Court No. 93–09–00568–CVD, challenge Commerce's *German Certain Steel Final Determination*, arguing it is unsupported by evidence on the record and is not otherwise in accordance with law with respect to two issues. First, Fried. Krupp argues Commerce's decision to countervail one-half of the German government-funded portion of early retirement aid provided pursuant to Article 56(2)(b) of the ECSC Treaty is unsupported by substantial evidence and is not in accordance with law. Second, Fried. Krupp argues Commerce's decision to countervail funds provided under the German government's Aid for the Closure of Steel Operations program is also unsupported by substantial evidence and is not in accordance with law.

1. *Article 56(2)(b) of the ESCS Treaty:*

The European Coal and Steel Community was formed in 1951 by the ECSC Treaty and is one of three communities which joined together in 1965 to form the European Communities. The ECSC's objectives include improving the working conditions and standards of living for workers in the steel industry, and to that end, Article 56(2)(b) of the ECSC Treaty provides assistance for social adjustment to workers employed in the coal and steel industries who are affected by plant closings, downsizing or other labor force reductions or restructuring measures, particularly as workers withdraw from the labor market or are forced into early retirement or unemployment. The ECSC disburses assistance under this program on the condition that the country in which workers are displaced makes an equivalent contribution. Under the program, the company first pays the employees and is subsequently reimbursed by the federal government through the local labor office. *See German Certain Steel Final Determination*, 58 Fed. Reg. at 37,320; *GOG's Responses to Commerce's Aug. 10, 1992 Questionnaire* in Fried. Krupp's App. Tab 4 at 48. In evaluating this program, Commerce concluded "[s]ince the ECSC portion of payments under this program comes from the operational budget, which is funded by levies on the companies, we determine that this portion *(i.e.*, 50 percent of the amount received) is not countervailable." *German Certain Steel Final Determination*, 58 Fed. Reg. at 37,320.

The German government contributed to the ECSC program, providing benefits to workers who retired or were laid off subject to negotiations between labor and management. On June 27, 1988, pursuant to the Guideline for Granting Aid to the Iron and Steel Industry, the GOG increased its contribution to workers under Article 56(2)(b). *See id.* at 37,318. In evaluating the GOG's contribution to this program, Commerce considered whether, in the absence of ECSC assistance, the steel

companies would have been obligated to furnish the same amount of early retirement benefits to their employees. In Germany, a company's obligations to employees who are forced into early retirement are outlined in the company's social plan, a negotiated agreement between the company and its employees which sets out the terms and conditions for ending employment and ways to mitigate the adverse effects on the employees of changes in the company's employee make-up.[18] In the *Preliminary Determination*, Commerce determined the entire amount of Article 56(2)(b) aid provided by the GOG was countervailable, because "the provision of funds is limited to a specific industry, and because the funds relieved companies of obligations they normally would have incurred." *Preliminary Determination*, 57 Fed. Reg. at 57,778. In the *German Certain Steel Final Determination*, Commerce concluded its *Preliminary Determination* on this issue had been in error, stating:

> the German steel companies and their workers were aware when they negotiated their social plans that the German government would pay a portion of the costs. Therefore, we have determined that one half of the amount paid by the government constitutes a countervailable subsidy.

German Certain Steel Final Determination, 58 Fed. Reg. at 37,320–21. The Department's methodogy for determining what portion of the Article 56(2)(b) contributions were to be countervailed is found in the *General Issues Appendix*, which states that to the extent a government assumes obligations that exist or otherwise would exist for steel companies, the government portion of the benefit is countervailable. *See General Issues Appendix*, 58 Fed. Reg. at 37,256–57.

Fried. Krupp argues "the purely hypothetical approach adopted by [Commerce] in analyzing Article 56(2)(b) aid in this investigation is inherently contrary both to [Commerce's] own established methodology for analyzing worker assistance programs and to the language and structure of the countervailing duty statute." (Fried. Krupp's Br. at 8.)

First, Fried. Krupp explains in past investigations of worker assistance programs, Commerce "consistently has recognized the need for [a] limitation on what can properly be deemed a 'subsidy' under § 1677(5)(A)(ii)(IV)" and has therefore held a government's provision of assistance to workers confers a countervailable benefit only to the extent that such assistance "'relieves an enterprise or industry of a pre-ex-

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[18] The GOG explained that on the occasion of a planned change in operations "the employee's council may demand that the employer conclude a social plan with the employees by which the economic disadvantages that the employees incur in the wake of the planned changes are counteracted or mitigated (e.g. severance pay)" or early retirement aid. (*GOG's Responses to Commerce's 8/10/92 Questionnaire* in Fried. Krupp's App 4 at 52.) The GOG further explained "[a] company change requiring the conclusion of a social plan is, above all, a reduction or closure of operations or of a major part of operations." *(Id.)* The GOG also explained

> The obligation to conclude social plans upon plant closures pursuant to Section 112 of the Industrial Constitution Act continues to be binding independent of * * * [Article 56(2)(b)]. The extent and volume of these social plans is exclusively determined by the company and the representatives of the employees.

(App. to Domestic Producers' Mem. in Opp'n to Fried. Krupp's Mot. for J. Upon Agency R. Ex. 7 at 50.)

isting statutory or contractual obligation.'"[19] *(Id.* at 12–13 (citation omitted) (footnote omitted).) Fried. Krupp argues that evaluated under this methodology established by Commerce, "the German Government-funded portion of Article 56(2)(b) aid clearly is not countervailable" because "the Article 56(2)(b) program provides benefits solely to eligible steel workers, with the German steel companies acting at most as mere conduits for government aid", "which flowed from the Government to workers, without providing any subsidy to [the German producers]." *(Id.* at 14, 18.) Fried. Krupp analogizes this case to others in which Commerce determined there was no countervailable benefit. *(Id.* at 15 (citing *Final Affirmative Countervailing Duty Determinations*; *Certain Steel Products From Belgium*, 47 Fed. Reg. 39,304, 39,309 (Dep't Comm. 1982) (Commerce did not countervail a labor assistance program because it determined the program "is really assistance to the workers passed through the companies" and payment of early retirement benefits does not confer a subsidy on a steel company unless it is thereby relieved of a cost it would otherwise be required to assume); *Final Affirmative Countervailing Duty Determination: Carbon Steel Wire Rod From France*, 47 Fed. Reg. 42,422, 42,431 (Dep't Comm. 1982) (Commerce determined it agreed companies at issue served as conduits for the distribution of certain funds and did not countervail them)).)

Fried. Krupp argues even where steel companies have undertaken to pre-pay Article 56(2)(b) aid as part of their labor agreements, "they have done so only upon the condition that the company would then be entitled to receive reimbursements for any pre-paid amounts from the German Government." (Fried. Krupp's Br. at 15–16 (footnote omitted).) Fried. Krupp concludes Commerce has not identified any evidence on the record indicating what obligation, "'preexisiting or otherwise", German steel companies had to their employees that was relieved by the German Government's contribution to the Article 56(2)(b) program. Fried. Krupp argues, rather, "[t]he record * * * is replete with overwhelming verified evidence that the other German steel companies made the provision of early retirement benefits contingent on the eligibility and receipt by early retired workers of assistance under Article 56(2)(b)." (Fried. Krupp's Reply at 9–10 (footnote omitted).) Fried. Krupp maintains the German steel companies had no obligation under German law to provide displaced workers with any social benefits, because "the terms and conditions of any agreements that result from negotiations between a company and its workers [*i.e.*, social plans] are not regulated by German law." (Fried. Krupp's Comm. on *Preliminary Determination*, *reprinted in* Fried. Krupp's App. Tab 16 at 7 (footnote

[19] Before Commerce may impose a countervailing duty, it must determine the German government is "providing, directly or indirectly, a *subsidy* with respect to the manufacture, production, or exportation of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States." 19 U.S.C. § 1671(a) (1988) (emphasis added). The term "subsidy" is defined by the statute to include a number of specified types of "domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries * * *." 19 U.S.C. § 1677(5)(A)(ii) (1988). Worker assistance programs, such as Article 56(2)(b) of the ESCS Treaty, are properly analyzed to determine whether they constitute a countervailable subsidy under subpart (IV) of 19 U.S.C. § 1677(5)(A)(ii), which provides that a "subsidy" for purposes of the CVD law may include "the assumption of any costs or expenses of manufacture, production, or distribution." 19 U.S.C. § 1677(5)(A)(ii)(IV) (1988).

omitted).)[20] Fried. Krupp concludes under Commerce's own methodology for analyzing worker assistance programs, "a government bestows no countervailable benefit where it imposes an obligation on a company and subsequently relieves the company of that obligation." (Fried. Krupp's Reply at 19.)[21]

Second, Fried. Krupp contends the hypothetical labor negotiation upon which Commerce based its methodology is not supported by any evidence on the record. Fried. Krupp contends Commerce never identified evidence in the record "of the actual power of labor unions in the German steel industry." (Fried. Krupp's Reply at 12.) Fried. Krupp argues:

> rather than simply looking to see whether Article 56(2)(b) aid has in fact relieved German steel companies of some contractual obligation * * * [Commerce] attempted to speculate about whether, in the absence of the German Government's contribution under Article 56(2)(b), the respondent steel companies might have elected to incur some new or different form of early retirement obligation to their workers.

(Fried. Krupp's Br. at 19.)

Fried. Krupp continues to contend that based on conjecture, Commerce made two factual assumptions about the effects of the Article 56(2)(b) program on labor negotiations in the German steel industry that were unsupported by any evidence on the record. Fried. Krupp maintains Commerce assumed absent the German government's contribution to Article 56(2)(b) that: (1) the issue of an increase in early retirement benefits would have become a point of meaningful negotiations and disagreement between the steel companies and their labor unions, and (2) the parties to such labor negotiations would have been of equal "negotiating strength" and would have agreed to provide their employees with 50% of the early retirement aid they had demanded. Fried. Krupp argues, rather, the "steel companies' prompt and complete responses to [Commerce's questionnaires] clearly indicated that the Article 56(2)(b) program relieved the companies of absolutely no legal or contractual obligations of any kind." *(Id.* at 22 (footnote omitted).)

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[20] The GOG explained that within the German legal system,

> there is no statutory provision generally obliging an employer to pay a severance pay upon dismissing an employee from the company.
>
> The payment of severance pay may be part of a collective bargaining agreement between management and labor. It may also be agreed on in the social plan worked out by the employees' council and management.

GOG's Responses to Commerce's Aug. 10, 1992 Questionnaire in Fried. Krupp's App. Tab 4 at 51–52. Additionally, the *General Issues Appendix* states "[i]n Germany, companies have no minimal legal obligation to severed employees. Rather, a company's obligations are determined through negotiations with the labor union. The obligations, if they exist at all, exist by virtue of the social plans that are negotiated." General Issues Appendix, 58 Fed. Reg. at 37,257.

[21] The GOG's Questionnaire responses assert

> [o]n the one hand, [Article 56(2)(b) aid] is also a benefit to which the individual employee in the company affected by closure has a claim. On the other hand, these support measures do not replace legal commitments by the company on behalf of their employees. There are no comparable legal commitments by the companies. The obligation to conclude social plans upon plant closures * * * continues to be binding independent of a measure in line with [Article 56(2)(b)]. The extent and volume of these social plans is exclusively determined by the company and the representative of the employees.

GOG's Responses to Commerce's 8/10/92 Questionnaire in Fried. Krupp's App. Tab 4 at 48–49.

Defendant argues "Commerce reasonably determined that one-half of the GOG-funded early retirement and other assistance provided pursuant to Article 56(2)(b) of the [ECSC] Treaty relieved Hoesch and other German steel companies of a contractual obligation they otherwise would have incurred, and thus constituted a countervailable subsidy," (Def.'s Br. at 71), fulfilling the requirement that Commerce must be able to "determine, on a case by case basis, exactly what the companies' obligations to severed employees are." *General Issues Appendix*, 58 Fed. Reg. at 37,256. Defendant argues Commerce reasonably based its determination upon its finding that when the steel companies and their workers negotiated social contracts to provide for their early retirement and severance benefits, they were aware the GOG, pursuant to Article 56(2)(b), would contribute a specified portion of that aid, and therefore, "*some* portion of the government assistance relieved the companies of a contractual obligation they otherwise would have incurred." (Def.'s Br. at 72.)[22]

Defendant continues to explain that due to the difficulty of determining the relative negotiating strengths of the companies and the employees, Commerce could not "measure the exact extent to which the GOG's contribution relieved the companies of providing more contractual benefits than they did", but found that absent the ECSC program, the contract negotiations would have resulted in different company obligations. *(Id.)* As a result of growing concern on the part of labor over job security and the steel industry's downsizing, defendant concludes "it stands to reason that job security and severance benefits would have been the single greatest concern on the part of labor." *(Id.* at 77.)[23] Defendant maintains, therefore, it was reasonable for Commerce to conclude that increased early retirement and other benefits were issues of serious concern during the social plan negotiations, and it would have been in labor's interest to demand a larger severance package from the companies. On this basis, defendant explains, Commerce determined that absent the Article 56(2)(b) aid from the GOG, labor could have compelled the steel companies to make additional concessions. Hence, "Commerce reasonably concluded that the government contribution did, in fact, relieve [Fried. Krupp] of *some* identifiable contractual 'ob-

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[22] In the *General Issues Appendix*, the Department distinguished between situtations where government contributions relieve companies of obligations made under existing agreements which are negotiated with employees and situations when the contract is still being negotiated at the time the government's willingness to assume a portion of the program costs become known, "because the government's contribution is likely to have an effect on the outcome of the negotiations." *General Issues Appendix*, 58 Fed. Reg. at 37,256. The Department's hypothetical on the labor negotiations follows from this distinction.

[23] In its reply brief, Fried. Krupp argues Commerce

> was in no position to assess what level of early retirement benefits, if any, workers in the German steel industry might have demanded. * * *
>
> [N]o evidence on the record * * * supported the assumption that workers in the German steel industry would have demanded a certain level of increased severance benefits, thereby making any reasoned measurement or estimate of any alleged subsidy impossible.

(Fried. Krupp's Reply at 7–8.) Fried. Krupp additionally argues "[t]he record is also devoid of any evidence that labor unions in the German steel industry would or could have successfully demanded increased early retirement benefits for workers." *(Id.* at 7 (footnote omitted).)

ligation it would otherwise have incurred'" and this relief "constituted a countervailable subsidy in some amount." *(Id.* at 78.)[24]

As a result of the difficulty in determining the outcome of the negotiations, defendant maintains it would be reasonable to assume the unions and government had equal bargaining power and that therefore, Commerce determined that for cash deposit purposes, "one-half of the government payment goes to relieving the company of an obligation that would otherwise exist." *General Issues Appendix*, 58 Fed. Reg. at 37,256. While defendant acknowledges Commerce's assumption was speculative, defendant argues Commerce determined "'any other outcome is both as speculative and prejudicial.' In other words, it would have been unreasonable to conclude that either the workers or the companies would have completely prevailed in the negotiations." (Def.'s Br. at 81 (citation omitted).) Defendant argues Commerce used the best information available to measure the contractual obligation to be countervailed. Defendant notes Commerce invited the parties to comment on improved methodologies for determining the amount to be assessed, but the parties failed to suggest any alternative methodologies.

Defendant also asserts the present determination is consistent with each of Commerce's previous worker assistance determinations, "and any differences are distinguishable based upon the facts of the two cases." *(Id.* at 85.) Defendant contrasts the decision in *Final Affirmative Countervailing Duty Determinations; Certain Steel Products From Belgium*, 47 Fed. Reg. 39,304, 39,324 (Dep't Comm. 1982), where Commerce determined ECSC housing loans for workers provided the steel companies with hypothetical benefits and were "too remote to be considered subsidies" with this case, where substantial record evidence provides a firm basis for determining that steel companies received countervailable benefits. Defendant also contrasts the situation in *Final Affirmative Countervailing Duty Determinations: Carbon Steel Structural Shapes, Hot-Rolled Carbon Steel Plate, and Hot-Rolled Carbon Steel Bar from the United Kingdom; and Final Negative Countervailing Duty Determination: Cold-Formed Carbon Steel Bar from the United Kingdom*, 47 Fed. Reg. 39,384, 39,391 (Dep't Comm. 1982), where Commerce found the government supplied a benefit to a third party which the company was not otherwise required to supply and thus was not a countervailable subsidy, with this case where the companies were required to supply the worker with negotiated benefits.

Defendant concludes by asserting "[Fried. Krupp] and the other [steel companies] were fully aware that the GOG's decision to relieve a contractual obligation such as a social contract could result in a countervailable benefit just as relieving most legal or statutory obligations

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[24] Defendant continues to comment on Commerce's discussions of the hypothetical negotiations that may have occurred between labor and the steel companies. In order to determine how large a portion of the benefits would be countervailable, Commerce had to determine the extent the government assumed obligations that existed or otherwise would have existed for the companies. *(See* Def.'s Br. at 78–79.) Commerce ultimately found the amount of the relative obligations of the companies and workers was entirely dependent on the strength and negotiating powers of the workers' unions.

would." (Def.'s Br. at 89.) Defendant maintains Fried. Krupp's claim the assistance it provided to workers was expressly conditioned on the subsequent ability of the company to obtain reimbursement from the government is "blatantly incorrect" because an examination of Fried. Krupp's social contract reveals the company obligated itself to provide a complete compensation package, of which the GOG relieved only a specified amount.

Domestic Producers agree with the defendant and argue the Department's decision "is amply supported by the record and is clearly within the ambit of both the statute and the Department's previous determinations." (Domestic Producers' Mem. in Opp'n to Fried. Krupp's Mot. for J. on the Agency R. "(Domestics' Opp'n Br.") at 7.) Domestic Producers argue German law required the steel companies to develop social plans to deal with hardships caused by plant closings, and money given to the companies by the GOG benefitted the companies. Domestic Producers maintain

> [Fried. Krupp] is therefore mistaken when it asserts that the German steel companies were under no statutory obligation to provide assistance to workers made redundant by plant closings.
>
> * * * * * * *
>
> It is clear that the [companies] had obligated [themselves] to provide severance benefits to [their] employees, regardless of the level of contributions from the government. Thus, any assistance by the GoG must therefore be viewed as an "assumption" of a contractual obligation.

(Id. at 14, 17.) Domestic Producers conclude the Department's hypothetical regarding the impact government aid would have had on company negotiations with employees "is a reasonable means of approximating the assumption of costs the steel companies would otherwise have incurred." *(Id.* at 21.)

The question before this Court, therefore, is whether the steel companies were serving as mere conduits for government aid to steel workers or whether they had contractual obligations to the steel workers which were relieved by government aid. After considering the evidence and arguments of all parties on this issue, this Court finds Commerce's decision to countervail one-half of the German government-funded portion of the early retirement aid is supported by substantial evidence on the record and is otherwise in accordance with law. The *Proposed Regulations* state that "[t]he provision by a government of financial assistance to workers confers a countervailable benefit to the extent that such assistance relieves a firm of an obligation which it normally would incur." *Proposed Regulations*, 54 Fed. Reg. at 23,382 (to be codified at 19 C.F.R. § 355.44(j)). *See also General Issues Appendix*, 58 Fed. Reg. at 37,256 (in order to countervail aid received pursuant to a worker assistance program, Commerce "must determine, on a case by case basis, exactly what the companies' obligations to the severed employees are" and the extent to which the government's worker assistance program relieved a por-

tion of those obligations); *Final Negative Countervailing Duty Determinations; Certain Softwood Products From Canada*, 48 Fed. Reg. 24,159, 24,167–68 (Dep't Comm. 1983).

In this case, Commerce determined the GOG's contributions relieved the steel companies of pre-existing obligations they incurred under German law through their social plans to negotiate with their employees to mitigate social hardships resulting from plant closings and employee lay-offs and provide the employees with assistance. Although the employer and employees have the freedom under German law to decide on the terms and conditions of benefits, the regional government of Saarland recognized "[i]t is mandatory to put up redundancy schemes [social plans] especially when the entire operations or essential parts thereof are to be discontinued" and "when laid off, employees may obtain social assistance from the company." (Gov. of Saarland's Deficiency Questionnaire at 6 *(reprinted in* App. to Domestics' Mem. in Opp'n to Fried. Krupp's Mot. for J. Upon Agency R. Ex. 2).) Commerce previously determined "the steel companies do have contractual and statutory obligations to pay severance to laid-off workers" that are "legally binding." *Carbon Steel Wire Rod from France*, 47 Fed. Reg. at 42,430–31. As a result, this Court finds the steel companies benefitted from the GOG's contributions when they were relieved of obligations they had under the social plans with their employees and sustains Commerce's decision on this issue, finding it to be supported by substantial evidence on the record and otherwise in accordance with law.

This Court additionally notes Commerce found one company, Ilsenburg, had not yet negotiated a social plan with its workers during the period of investigation. Commerce concluded, as a result, "Ilsenburg had no obligation, legal or contractual, to provide payments to workers who were laid off", and "the portion of Article 56(2)(b) payments (funded by the GOG) made for Ilsenburg's workers do not constitute a subsidy because they did not relieve the company of an obligation it would otherwise have had." *German Certain Steel Final Determination*, 58 Fed. Reg. at 37,321. While this Court also notes Domestic Producers' argument that there was no obligation under German law for the companies to do more than negotiate with their workers, this Court finds for those companies which had concluded social plans with their workers, Commerce acted reasonably in determining the GOG's contributions relieved the steel companies of contractual obligations they would have incurred.

A separate issue is whether Commerce properly calculated the amount of the subsidy as one-half of the GOG's contributions. This Court finds Commerce's calculation of the subsidy as one-half the GOG's contributions is a reasonable estimate that is supported by substantial evidence on the record and is otherwise in accordance with law. Commerce had to determine what labor and management would have agreed to in the contract negotiations in the absence of the government's contribution to the early retirement program. Exactly what

those obligations would have been is entirely dependent on the relative strength of the negotiating parties. While Commerce could not determine exactly what would have occurred had the government not been a party—albeit an invisible one—to the negotiations, it was reasonable for Commerce to determine that officials would have renegotiated the terms of the plan, absent the government's contribution. This Court notes defendant's statement Commerce invited the parties to comment on improved methodologies for determining the amount to be countervailed, but the parties failed to do so. Further, this Court notes no party has requested an administrative review of the formula determined by Commerce. As a result of the above, this Court sustains the determination of Commerce, finding it to be supported by substantial evidence on the record and otherwise in accordance with law.

2. *Aid for the Closure of Steel Operations:*

Commerce's *German Certain Steel Final Determination* also countervailed a separate worker assistance program created by the German government's Rules on Providing Funds to Iron and Steel Companies to Give Social Assistance for Structural Adjustment, which were adopted by the GOG on May 3, 1988 (the "May 3, 1988 Rules"). This program was designed to reduce the economic and social costs of plant closings in the steel industry, and the federal and state governments provided grants to the iron and steel industries for expenses incurred with respect to displaced employees. Assistance under this program was available for workers laid off between January 1, 1987 and December 31, 1990, a period in which about 35,000 employees in the steel industry were laid off. *See Verification of the GOG's Questionnaire Response* in App. of Answers of Def. and Def.-Intervs.' to Ct.'s Questions Reg. Worker Assist. posed at Oral Arg. Ex. 4 at 6.

In its reply brief, Fried. Krupp quotes Commerce's description of the agreement[25] the GOG entered into with the steel companies, noting that

> "[i]n an effort to avoid country-wide unemployment of young people and therefore potential social unrest, the [GOG] *convinced* the companies to lay-off those closer to retirement age thereby keeping the workforce young. In return, the [GOG] (through both federal and state funds) would * * * provide grants of up to 50 percent of the companies' net outlays for redundant employees."

(Fried. Krupp's Reply at 17 (quoting Pre-pension Mem. (Pub. Doc. 138 F. 48 Fr. 24) at 6).) The agreement encouraged the steel companies to lay-off older workers, thereby causing the companies to incur greater severance costs than if they had laid-off younger workers. The total amount of federal and state aid provided to steel companies was not permitted to exceed fifty percent of a company's net expenditures incurred

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[25] The agreement was known as the Frankfurt Agreement, entered into by the GOG with the steel companies on June 10, 1987. According to the GOG, by means of the May 3, 1988 Rules, "mass dismissals in the steel industry were averted and the process of reconstructuring was bolstered." *GOG's Responses to Commerce's Aug. 10, 1992 Questionnaire* in Fried. Krupp's App. Tab 4 at 50.

as a result of plant closings. *See German Certain Steel Final Determination,* 58 Fed. Reg. at 37,318.

In both the *German Certain Steel Preliminary* and *Final Determinations*, Commerce found the entire amount of GOG aid provided pursuant to this worker assistance program was countervailable. *See German Certain Steel Final Determination*, 58 Fed. Reg. at 37,318; *Preliminary Determination*, 57 Fed. Reg. at 57,778. Commerce stated

> [a]lthough it was claimed that closure assistance was provided so that companies would lay off older rather than younger workers, the amount of assistance provided by the GOG does not appear to take into account the difference in the costs of laying off the differently aged workers. Instead, it is calculated using the total costs of reducing the work force. Therefore, in accordance with the Department's general determination regarding early retirement, we determine that the assistance did not merely benefit the older employees who were retired early. Instead, it relieved the company of a portion of the early retirement costs it otherwise would have incurred. The Department has determined that this benefit constitutes a countervailable subsidy * * *.

German Certain Steel Final Determination, 58 Fed. Reg. at 37,318.

In the *General Issues Appendix*, Commerce set out its methodology regarding various types of worker assistance programs, and stated in order for a worker assistance program to be countervailable, "the Department must determine, on a case by case basis, exactly what the companies' obligations to severed employees are." *General Issues Appendix*, 58 Fed. Reg. at 37,256. Commerce explained when the government, by law, imposes obligations upon all companies generally, "a program which relieves a company of these legal obligations is clearly countervailable." *Id.* Commerce also determined

> [i]n many instances, companies' obligations to their terminated employees are not outlined under the law, but under contracts negotiated with the workers. When these contracts are already in place and the government subsequently steps in to assume a portion of the amount the company is obligated to provide, we have determined that government assistance is countervailable. Thus, we are treating certain contractual obligations as legal obligations.

Id. Finally, Commerce explained when the government's willingness to provide assistance is known at the time the contract is being negotiated, absent evidence to the contrary, Commerce will presume the negotiating parties would have split the difference. Commerce would then consider that one-half of the government contribution relieved the company of an obligation that otherwise would have existed. *See id.* Commerce explained its reasoning:

> The Department could determine that absent the ECSC program, the contract negotiations would have resulted in different company obligations. In Germany, exactly what those obligations would have been, however, is entirely dependent on the strength and negotiating powers of the steelworkers' unions; there is no indication of a

> minimum level of benefits a terminated employee expects to receive. Therefore, the Department could either assume that the unions were weak and would not have been able to demand the full amount that they receive under the ECSC program, or that they were strong, and would have received the full amount. Since either assumption would be completely arbitrary, the Department's *most reasonable solution* would be to assume that both the unions and the companies have equal bargaining power, and that therefore, absent the ECSC program, the companies would be required to pay half of the amount of aid granted by the ECSC and the government under the ECSC program. This would mean that half the benefits from the program would be countervailable. However, since the ECSC portion of the contributions cannot be countervailed (because they are financed by company contributions), the amount which would be countervailed would be equal to one-half of the government contribution.

(See Commerce Memo re Treatment of Prepension Benefits and Worker Assistance Programs in App. of Answers of Def. and Def.–Intervs.' to Ct.'s Questions Reg. Worker Assist. Posed at Oral Arg. Ex. 9 at 15–16 (emphasis added).)

Fried. Krupp additionally challenges Commerce's decision to countervail funds provided under the German government's Aid for the Closure of Steel Operations program, arguing it is unsupported by substantial evidence and contrary to Commerce's own established methodology. Fried. Krupp argues uncontradicted evidence in the record "demonstrates that funds provided under this program were used to provide assistance to workers who had lost their jobs *and* that the assistance in question would not have been provided to those workers in the absence of the [program]." (Fried. Krupp's Br. at 9.)

Fried. Krupp argues "[t]he record is clear that the steel companies agreed to provide as full a package of severance and early retirement benefits to their workers as they ultimately did only 'because of the government's commitment to provide aid to retired workers.'" *(Id.* at 26 (citation omitted).) As a result, Fried. Krupp maintains the steel companies were not relieved of any obligations that they had incurred or normally would have incurred in the absence of the program created by the May 3, 1988 Rules. Fried. Krupp argues, "[r]ather, under that program, the companies were acting merely as conduits of government aid designed to assist displaced workers in the steel industry." *(Id.* at 27.)

In response, defendant argues Fried. Krupp did not raise any objection to Commerce's determination on this issue at any time during the administrative proceeding. Defendant argues as a result, Fried. Krupp "failed to exhaust its administrative remedies" and "should be precluded from raising this issue before the Court now." (Def.'s Br. at 62 (citing 19 C.F.R. § 355.38(a) (1992) (Commerce "will consider in making the final determination * * * only written arguments in case or rebuttal briefs filed within the time limits in [the regulations]").) Defendant concludes Fried. Krupp "should be barred from arguing, for the first time

before this Court, that Germany's closure assistance is not countervailable. (Def.'s Br. at 63 (footnote omitted).) Defendant additionally maintains none of the exceptions to the exhaustion requirement are applicable in this case.[26]

Defendant argues even if the Court reaches the merits of this issue, Commerce's determination should be affirmed because it is based upon substantial evidence and is otherwise in accordance with law. Defendant maintains Fried. Krupp incorrectly argues it and the other steel companies agreed to provide laid-off workers with a package of benefits only with the expectation the government would pay one-half of those benefits. Defendant explains, rather "substantial evidence in the record clearly establishes that when the GOG passed the [May 3] Rules in 1988, it relieved [Fried. Krupp] of the obligation under [Fried. Krupp]'s social contract, renegotiated in 1986, to provide early retirement and severance benefits to its employees." (Def.'s Br. at 71.) Defendant concludes Fried. Krupp's obligation to its workers predated the GOG's adoption of the May 3, 1988 Rules by almost two years.

After carefully considering the arguments of both parties as well as the evidence on the record, this Court finds Commerce's determination to countervail the benefits provided under the May 3, 1988 Rules is supported by substantial evidence on the record and is otherwise in accordance with law. First, this Court considers it proper to evaluate Fried. Krupp's challenge to Commerce's determination to countervail this worker assistance program because Fried. Krupp raised this challenge to Commerce's decision and methodolgy in a timely manner, after Commerce articulated its policy on pre-pension programs in the *General Issues Appendix* and applied that methodology to the worker assistance program at issue in this case—the May 3, 1988 Rules. This Court noted in *Al Tech Specialty Steel Corp, v. United States,* 11 CIT 372, 377, 661 F. Supp. 1206, 1210 (1987) that "in determining whether questions are precluded from consideration on appeal, the Court will assess the practical ability of a party to have its arguments considered by the administrative body." In *Philipp Bros., Inc. v. United States,* 10 CIT 76, 86, 630 F. Supp. 1317, 1324 (1986), this Court held that because Commerce did not address the issue challenged before the Court until its final decision, plaintiff had no opportunity to raise the issue at the administrative level and the exhaustion doctrine did not preclude judicial review. The Court

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[26] Although in its Motion for Judgment on the Agency Record, Thyssen indicates the basis of its claims is set forth in the brief filed with this Court by Fried. Krupp, in its reply brief, Thyssen also states

> [i]n response to defendant's suggestion * * * Fried Krupp failed to exhaust its administrative remedies and, therefore, is precluded from challenging the methodology used by [Commerce] to countervail the Aid for Closure program, we note that Thyssen challenged the DOC's Determination regarding this program in its April 1, 1993 Case Brief at 9. Thus, even if this Court agrees with defendant that Fried Krupp cannot challenge [Commerce's] determination at this time, this Court nevertheless should summarily dismiss defendant's "exhaustion" claim and decide this issue on in [sic] merits, since Thyssen's challenge clearly is not barred by the exhaustion doctrine.

(Thyssen's Reply Br. at 1–2.) In its reply brief, Fried. Krupp addresses defendant's exhaustion argument and maintains

> it would have been totally impossible for [Fried. Krupp] to have challenged [Commerce's] methodology during the underlying investigation, because [Commerce] did not articulate that methodology until the Final Determination. In light of the relevant statutory standards and case precedent regarding the exhaustion of administrative remedies doctrine, this Court should reject Defendant's exhaustion argument and consider Plaintiffs' current challenge to [Commerce's] treatment of the Aid for Closure program in the Final Determination.

(Fried. Krupp's Reply at 13.)

similarly finds in this case, Fried. Krupp did not have the opportunity to challenge Commerce's methodology until Commerce articulated that methodology and applied it to the program at issue. Moreover, this Court notes Thyssen also challenged Commerce's decision to countervail the Aid for Closure program after the *Preliminary Determination*, albeit on more limited and general grounds. As a result, this Court will address the merits of Commerce's determination to countervail the Aid for Closure program.

The Court notes Commerce determined the GOG's adoption of the May 3, 1988 Rules relieved the steel companies of obligations they would have incurred pursuant to social contracts negotiated with their employees, and this Court cannot find a reason to disturb that determination. *See General Issues Appendix*, 58 Fed. Reg. at 37,255 (in order to be countervailable, a worker assistance program must relieve a company of a pre-existing statutory or contractual obligation the company has previously incurred or otherwise would have incurred) (citing *Proposed Regulations*, 54 Fed. Reg. at 23,382 (to be codified at § 355.44(j))); *Final Affirmative Countervailing Duty Determination: Carbon Steel Wire Rod From Belgium*, 47 Fed. Reg. 42,403, 42,408, 42,424 (Dep't Comm. 1982). Commerce explained

> [i]f the Government contributions which were provided had been directly correlated to the costs of laying off older workers, then the company would be receiving no benefit from this program. However the GOG assistance was calculated on the total costs of reducing the workforce, not just the difference in costs of terminating the older employees versus the younger employees, thereby indicating that the assistance did not merely benefit the older employees who retired early.

(*Commerce Mem. re Treatment of Prepension Benefits and Worker Assistance Programs* in App. of Answers of Def. and Def.-Intevs.' to Ct.'s Questions Reg. Worker Assist. Posed at Oral Arg. Ex. 9 at 17.) As a result, this Court sustains Commerce's determination on this issue, finding it is supported by substantial evidence and otherwise in accordance with law.

CONCLUSION

After considering the parties' Motions for Judgment on the Agency Record and the parties' arguments therein, and for the reasons discussed above, this Court holds Commerce's *German Certain Steel Final Determination* is supported by substantial evidence on the record and is otherwise in accordance with law. Accordingly, this Court denies Domestic Producers's Motion for Judgment on the Agency Record, finding (1) Commerce's application of the 0.5 percent test; (2) Commerce's decision to use the Deutche Bundesbank industrial long-term bond rate for the benchmark and discount rates; and (3) Commerce's determination that Ilsenburg would be required to repay the amount of the grant and to treat a portion of the grant as a short-term loan are supported by substantial evidence on the record and are otherwise in accordance with

law. This Court additionally denies Thyssen's and Fried. Krupp's Motions for Judgment on the Agency Record, finding Commerce's decision to countervail one-half of the German government-funded portion of early retirement aid provided pursuant to Article 56(2)(b) of the ECSC Treaty is supported by record evidence. Additionally this Court finds Commerce's decision to countervail benefits provided under the Aid for Closure of Steel Operations program is supported by substantial evidence and is otherwise in accordance with law. This Court therefore grants defendant's application to sustain Commerce's *German Certain Steel Final Determination.*

SCHEDULE OF CONSOLIDATED CASES

Thyssen Stahl AG, et al v. United States, Court No. 93–09–00585–CVD.

AG der Dillinger Hüttenwerke v. United States, Court No. 93–09–00596–CVD.

Fried. Krupp AG Hoesch Krupp & Krupp Hoesch Stahl AG v. United States, Court No. 93–09–00603–CVD.

(Slip Op. 97–105)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NMB THAI LTD., PELMEC THAI LTD., NMB HI-TECH BEARINGS LTD. AND NMB CORP., DEFENDANT-INTERVENORS

Court No. 96–07–01782

Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. Torrington alleges that the Department of Commerce, International Trade Administration ("Commerce"), erred in: (1) relying upon related party sales as a basis for calculating constructed value ("CV") profits; (2) treating NMB's Route B sales as home market sales; (3) failing to determine whether antidumping duties were reimbursed to the importer; and (4) revoking the antidumping duty order at issue.

Held: Torrington's motion for judgment on the agency record is granted in part and denied in part. This case is remanded to Commerce to determine a proper methodology for calculating CV profit in the absence of cost of production data where related party sales are not made at arm's length.

[Torrington's motion for judgment on the agency record is granted in part and denied in part. Case remanded.]

(Dated July 28, 1997)

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., Geert De Prest and *Mara M. Burr*) for The Torrington Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); of counsel: *Stacy J. Ettinger,* Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

White & Case (*William J. Clinton, Christopher F. Corr* and *Richard J. Burke*) for NMB Thai Ltd., Pelmec Thai Ltd., NMB Hi-Tech Bearings Ltd. and NMB Corporation.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, The Torrington Company ("Torrington"), challenges aspects of the final results of the fifth antidumping administrative review of the antidumping duty order, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Thailand; Final Results of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order* ("*Final Results*"), 61 Fed. Reg. 33,711 (June 28, 1996). The administrative review at issue was conducted by the Department of Commerce, International Trade Administration ("Commerce"), and concerns antifriction bearing ("AFB") imports entered during the fifth review period, from May 1, 1993 through April 30, 1994. *Final Results*, 61 Fed. Reg. at 33,711.

Torrington claims that Commerce erred in: (1) relying upon related party sales as a basis for calculating constructed value ("CV") profits; (2) treating NMB Thai Ltd., Pelmec Thai Ltd., NMB Hi-Tech Bearings Ltd. and NMB Corporation (collectively "NMB") Route B sales as home market sales; (3) failing to determine whether antidumping duties were reimbursed to the importer; and (4) revoking the antidumping duty order at issue.

DISCUSSION

The Court has jurisdiction over this matter under 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Related Party Sales as a Basis for CV:*

For purposes of calculating CV, Commerce used profit information it obtained from NMB's questionnaire responses, which included related party sales. *See Final Results*, 61 Fed. Reg. at 33,712. Torrington argues that Commerce should have automatically excluded related party sales found not to be at arm's length from the calculation of profit. Torrington cites to the fourth administrative review of AFBs, contending that it has been Commerce's practice to exclude all related party sales in calculating profit for CV. Torrington's Mem. Supp. Mot. J. Agency R. at 15–17. Torrington also argues that there was sufficient evidence on the record for Commerce to perform a profit variance test and points to its April 26, 1995, submission, which allegedly demonstrates that the profit margins

establish that the related party sales at issue were not made in the ordinary course of trade. *Id.* at 10–11 (citing *Torrington's Profit Variance Submission*, C.R. Doc. No. 22, at 5, Torrington's App., Ex. F (April 26, 1995)).

Commerce first responds that in the fourth review it applied both an arm's-length test and a profit variance test to determine whether to disregard related party sales for the purpose of calculating profit for CV, and did not *automatically* exclude such sales. Def.'s Opp'n to Mot. J. Agency R. at 6–7 (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et. al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 Fed. Reg. 10,900, 10,922 (Feb. 28, 1995)). Further, Commerce asserts that it was unable to perform a profit variance test, *i.e.*, to determine whether the profit on sales that failed the arm's-length test varied significantly from the profit on sales to unrelated parties, because there was insufficient data on the record. In essence, Commerce claims that because it did not conduct a sales-below-cost investigation in this case, it did not have the cost information necessary to calculate profit rates for related and unrelated parties, and so, used the profit data provided by NMB in Commerce's questionnaire. *Id.* at 8. Moreover, Commerce contends that it properly refused to rely upon the profit margins calculated by Torrington because Torrington's sample methodology was not representative of the transactions under investigation, as required by 19 U.S.C. § 1677f–1 (1988). *Id.* at 9.

According to 19 U.S.C. § 1677b(e)(2), Commerce *may* disregard related party sales in determining CV if it finds that "in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration." This Court has sustained Commerce's use of the arm's-length test in conjunction with the profit variance test to determine whether to disregard related party sales. *See INA Walzlager Schaeffler KG v. United States*, 21 CIT ___, ___, 957 F. Supp. 251, 259 (1997). Hence, despite Torrington's claim to the contrary, Commerce is not required to automatically exclude related party sales found not to be at arm's length from the calculation of profit for CV.

Further, because Torrington did not ask for Commerce to conduct a below-cost sales investigation, as it could have under 19 C.F.R. § 353.31(c)(1)(ii) (1994), there was insufficient home market cost data for Commerce to use in conducting a profit variance test. This insufficiency is readily apparent in Commerce's proper refusal to accept Torrington's Profit Variance Submission, which only used a selected portion of NMB's CV data—about half of NMB's reported home market sales, themselves a sample of NMB's sales—in its attempt to calculate cost of production figures, which it then used to derive profit margins. *See* C.R. Doc. No. 22, at 5, Torrington's App., Ex. F. Torrington's calcula-

tions were also based on elements constituting an inaccurate basis for determining the cost of production for the subject merchandise. For instance, the selling, general and administrative expenses element used by Torrington is based on sales of the general class or kind of merchandise sold in the home market—a broad range of products that may consist of subject and non-subject merchandise, and so, cannot be used as a basis for calculating the cost of production of the subject merchandise.

The relevant issue remaining is whether Commerce's decision to accept NMB's reported profit data for use in determining CV was reasonable under the present circumstances. The Court is disturbed with Commerce's outright reliance on the data supplied by NMB in its questionnaire response for the calculation of profit for CV. Related party transactions are generally treated with distrust and are subject to special rules under the antidumping statute. *See* 19 U.S.C. § 1677a(e) (U.S. price); 19 U.S.C. § 1677b(a)(3) (foreign market value); 19 U.S.C. §§ 1677b(e)(2) and (3) (CV). The Court is particularly concerned in this case, where Commerce determined that NMB's related party sales were *not* made at arm's length. *See* Def.'s Opp'n to Mot. J. Agency R. at 8 (stating Commerce was able to perform the arm's-length test but did not have adequate data to perform the profit variance test for related party sales that failed the arm's-length test). Hence, the Court is not convinced that the amount Commerce used for CV profit is "equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration * * * in the ordinary course of trade," as required by section 1677b(e)(1)(B). Consequently, the Court remands this issue to Commerce to determine a proper methodology for calculating CV profit in the absence of cost of production data where related party sales are not made at arm's length.

2. *Treatment of NMB's Route B Sales:*

Torrington claims Commerce incorrectly classified Route B sales as home market sales and relied on these sales as a basis for foreign market value ("FMV"). In particular, Torrington claims the evidence failed to show that bearings made in Thailand and exported to Singapore were in fact sold for consumption in Thailand because the record did not link shipments to Singapore with the bearings actually re-exported to Thailand. Further, Torrington argues Commerce improperly reduced FMV for pre-sale freight expenses incurred on Route B shipments by treating these costs as indirect selling expenses. Torrington's Mem. Supp. Mot. J. Agency R. at 17–21.

In its appeal from *Torrington Co. v. United States*, 19 CIT ____, 881 F. Supp. 622 (1995), Torrington chose not to appeal this issue. Similarly, as Torrington informed the Court in that case, it abandons the issue in this case. Torrington's Reply Mem. Supp. Mot. J. Agency R. at 9. The Court therefore dismisses this claim.

3. *Determination of Reimbursement of Antidumping Duties:*

According to the reimbursement regulation, 19 C.F.R. § 353.26(a)(1), U.S. price is to be reduced by the amount a foreign manufacturer has

paid for antidumping duties on behalf of a U.S. importer, or has reimbursed the importer for such duties. This Court has sustained Commerce's interpretation of the reimbursement regulation, holding that the regulation does not impose upon Commerce an obligation to investigate based on mere allegation. *See Torrington*, 19 CIT at ____, 881 F. Supp. at 631. Rather, "the party who requests [such an] investigation must produce some link between the transfer of funds and reimbursement of antidumping duties" between related companies before Commerce is required to commit resources to investigate the transfers. *Id.* at 632.

Torrington claims this burden of proof is improperly placed on domestic industry. In particular, Torrington asserts that, because the foreign manufacturer and U.S. importer are related parties in exporter's sales price ("ESP") situations, a variety of reimbursement strategies may be employed (*e.g.*, pretended equity infusion, forgiven loans) that may be difficult, if not impossible, to detect. Hence, Torrington contends it is unreasonable to require domestic industry to show that reimbursement is occurring in such circumstances. Torrington's Mem. Supp. Mot. J. Agency R. at 21–24. While Torrington acknowledges that this Court has already upheld Commerce's interpretation, Torrington asks the Court to reconsider its position.

Commerce responds that the Court has sustained Commerce on the reimbursement issue on several occasions, holding that a petitioner must provide evidence beyond a mere allegation. Def.'s Opp'n to Mot. J. Agency R. at 16–20. NMB agrees with the position taken by Commerce. NMB's Opp'n to Mot. J. Agency R. at 18–20.

This Court has consistently stated that a petitioner is required to provide adequate evidence that reimbursement is occurring before Commerce must undertake an investigation. *See, e.g., Torrington Co. v. United States*, 21 CIT ____, ____, 960 F. Supp. 339, 342 (1997); *INA Walzlager*, 21 CIT at ____, 957 F. Supp. at 270; *FAG Italia S.p.A. v. United States*, 20 CIT ____, ____, 948 F. Supp. 67, 74 (1996). As this Court has noted, the mere fact that an exporter and importer are related is insufficient to warrant the commitment of resources to investigate the transfers and transactions between them. *INA Walzlager*, 21 CIT at ____, 957 F. Supp. at 270. Moreover, under 19 C.F.R. § 353.26(b), an importer is required to file a certificate prior to liquidation indicating whether the importer has entered into any agreement or understanding for the payment or refunding of antidumping duties. *Torrington*, 19 CIT at ____, 881 F. Supp. at 632. Once an importer has attested that there is no such reimbursement, it is unnecessary for Commerce to conduct an investigation absent a sufficient allegation of customs fraud. *Id.*

The Court finds no reason to depart from its consistent position on this issue. Consequently, Commerce's decision not to investigate possible reimbursement of antidumping duties between related parties was proper.

4. *Revocation of the Antidumping Duty Order With Respect to NMB:*

Commerce revoked the antidumping duty order with respect to NMB after finding that NMB had not sold ball bearings at less than fair market value for three consecutive review periods, including the instant review period, and would not do so in the future. *Final Results*, 61 Fed. Reg. at 33,714.

Torrington claims Commerce's revocation was based on two prior determinations of no or *de minimis* dumping margins for NMB, the administrative reviews of which remain subject to judicial review before the United States Court of Appeals for the Federal Circuit ("CAFC"). In particular, if the methodology and/or legal interpretation used in either of those cases, or in this case, fail to survive judicial review, Torrington contends the predicate for revocation of the order would be removed. Torrington's Mem. Supp. Mot. J. Agency R. at 24–25.

Commerce responds that it properly revoked the order with respect to NMB in this case. Nevertheless, in the event that NMB's margin is determined to be above *de minimis* by final court action in any of the three reviews, it would request permission of the Court to reinstate the order and instruct Customs to suspend relevant liquidation prospectively. Def.'s Opp'n to Mot. J. Agency R. at 21.

Under 19 U.S.C. § 1675(c) (1988), the administering authority has the power to revoke an antidumping duty order in whole or in part. Further, according to Commerce's regulations, it may revoke an order upon finding that a producer or reseller has not sold the merchandise at issue at less than fair market value for three consecutive review periods, including the instant review period, and concludes that the producer or reseller would not do so in the future. *See* 19 C.F.R. § 353.25(a). After making such a determination in this case, Commerce revoked the order with respect to NMB within the power granted to Commerce by the statute and in accordance with its stated regulations.

In the event that the CAFC determines that NMB's margins are above *de minimis*, Commerce would unquestionably have to petition to reinstate the order and instruct Customs to suspend liquidation prospectively. Nevertheless, at this time, Commerce's conclusion regarding NMB's margins has been upheld by this Court in the first of these three reviews, *see Federal-Mogul Corp. v. United States*, 21 CIT ___, Slip Op. 96–193 (December 16, 1997) and, as such, forms a proper basis for Commerce's revocation at this time. Consequently, Commerce's decision to revoke the antidumping duty order with respect to NMB was fully in accordance with law.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to allow it to determine a proper methodology for calculating CV profit in the absence of cost of production data where related party sales are not made at arm's length. The Final Results are sustained as to all other issues raised by Torrington.

(Slip Op. 97–106)

TORRINGTON CO., PLAINTIFF AND DEFENDANT-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC. AND SKF FRANCE, S.A., DEFENDANT-INTERVENORS AND PLAINTIFFS

Consolidated Court No. 95–03–00350

The Torrington Company ("Torrington") challenges the Department of Commerce, International Trade Administration's ("Commerce") explanation of its application of the reimbursement regulation in exporter's sales price ("ESP") situations contained in Commerce's *Results of Redetermination Pursuant to Court Remand, The Torrington Company v. United States, Slip Op. 96–163 (Oct. 3, 1996)* ("*Remand Results*"). Torrington moves for a an order directing Commerce to issue a second redetermination and either apply the reimbursement regulation on the basis of evidence already submitted or collect the necessary additional evidence.

Held: Plaintiff's motion for a second redetermination is denied. The Remand Results are affirmed in all respects.

[Plaintiff's motion is denied. The Remand Results are affirmed. Case dismissed.]

(Dated July 28, 1997)

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Lane S. Hurewitz)* for The Torrington Company.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *David R. Mason Jr.*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (Herbert C. Shelley, Alice A. Kipel and *Anne Talbot)* for SKF USA Inc. and SKF France, S.A.

OPINION

TSOUCALAS, *Senior Judge:* On October 3, 1996, this Court, in *Torrington Co. v. United States*, 20 CIT ____, 944 F. Supp. 930 (1996), remanded to the Department of Commerce, International Trade Administration ("Commerce"), the final determination concerning the fourth antidumping duty administrative reviews of antifriction bearings ("AFBs"), entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al. ("Final Results")*, 60 Fed. Reg. 10,900 (1995), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France*, 60 Fed. Reg. 16,608 (1995). On remand, the Court instructed Commerce to: (1) explain the circumstances in which it will apply the reimbursement regulation in an exporter's sales price ("ESP") situation; (2) utilize the approved tax-neutral methodology for adjusting for value-added taxes; and (3) correct the clerical error in the conversion formula used to calculate U.S. price.

On November 21, 1996, Commerce released draft remand results and invited interested parties to comment. After receiving comments from The Torrington Company ("Torrington"), Commerce filed its *Results of Redetermination Pursuant to Court Remand, The Torrington Company v. United States, Slip Op. 96–163 (Oct. 3, 1996) ("Remand Results").*

Torrington challenges Commerce's explanation of its application of the reimbursement regulation in ESP situations contained in Com-

merce's Remand Results. Torrington moves for an order directing Commerce to issue a second redetermination and either apply the reimbursement regulation on the basis of evidence already submitted, or collect the necessary additional evidence.

DISCUSSION

On remand, Commerce clarified that it will apply the reimbursement regulation "if record evidence demonstrates that the exporter directly pays antidumping duties for the importer or reimburses the importer for such duties in ESP * * * situations." *Remand Results* at 4. In response to a request by Torrington to reopen the administrative record, Commerce insists that its position in the Remand Results is consistent with its prior policy and previous court decisions. Commerce also argues that further evidence of intra-company transfers would not support the application of the reimbursement regulation since such transfers are not *per se* evidence of reimbursement. *Id.* at 8–9.

Torrington insists that Commerce has changed its position and, therefore, should be required to reopen the administrative review and investigate the possibility of reimbursement. Torrington contends that, in light of Commerce's new position, domestic industry should have the opportunity to present new evidence. *Torrington's Comments on Commerce's Remand Results ("Torrington's Comments")* at 3–4. Torrington further maintains that the evidentiary burden placed on domestic industry by Commerce's new policy "reduces the reimbursement regulation to a practical nullity." *Id.* at 4.

In support of Commerce, SKF USA Inc. and SKF France, S.A. (collectively "SKF") emphasizes Commerce's discretionary powers regarding investigations. According to SKF, Commerce has the discretion to refuse to collect additional information regarding a particular "subissue" raised during an administrative review. *SKF's Rebuttal Comments Regarding Commerce's Remand Results* at 4. In addition, SKF points out that many of the items sought by Torrington are already included in the record of the administrative proceedings. SKF insists that the evidence contained in the administrative record does not support a finding that SKF had been reimbursed for the payment of antidumping duties. *Id.* at 5–7.

After issuing the Final Results, Commerce clarified its position on the application of the reimbursement regulations in ESP situations in the administrative review entitled *Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Reviews* (*"Color TVs"*), 61 Fed. Reg. 4408, 4410–11 (1996), as follows:

> The Department's regulation on reimbursement applies to both purchase price and ESP transactions, notwithstanding our statement to the contrary in *Final Results of Antidumping Duty Administrative Reviews and revocation in Part of Antidumping Duty Order*, 58 FR 39729 (July 26, 1993) * * *. Contrary to our longstanding interpretation, in that AFBs review we stated that section 353.26 did not apply to ESP transactions because the exporter and

> related importer are treated as a single entity for margin calculation purposes. We concluded that because the related companies are considered to be a single entity, we could not treat the two companies as separate entities for purposes of duty payment.
>
> We have reconsidered our statement in AFBs and find it to be inconsistent with both the plain language of the regulations and the regulatory history. *See, e.g.*, 19 CFR 353.41 (defining U.S. price as the purchase price or the ESP). We also note that the statement of administrative action of the URAA [Uruguay Round Agreements Act] confirms that the Department has "full authority under its current regulations (19 CFR 353.26) to increase the duty when an importer, directly pays the duties due, or reimburses the importer, whether independent or affiliated, for the importer's payment of duties."
>
> The fact that margins are calculated based on prices to the first unrelated party in the United States does not warrant an assumption that there cannot be reimbursement of antidumping duties when the exporter and importer are related. How antidumping duties are calculated and who, under the law, is responsible for paying those duties are separate and distinct issues. The contrary reasoning in AFBs is inconsistent with the underlying policy of the reimbursement regulation. Accordingly, we are reaffirming our original view that reimbursement, within the meaning of the regulation, takes place between related parties if the evidence demonstrates that the exporter directly pays antidumping duties for the related importer or reimburses the importer for such duties.

(Citations omitted). In the Remand Results, Commerce reaffirmed its commitment to the approach explained in *Color TVs*. *See Remand Results* at 6–7.

The Court agrees with Commerce's conclusion in the Remand Results that Commerce has not changed its approach to the reimbursement regulation in a manner requiring a reopening of the administrative record. As a preliminary manner, the Court notes that, by arguing that Commerce's policy is inconsistent with law, Torrington is attempting to revisit issues already addressed by this Court. This Court has already upheld Commerce's requirement of evidence "beyond a mere allegation that the foreign manufacturer either paid the antidumping duty on behalf of the U.S. affiliate importer, or reimbursed the U.S. affiliate importer for its payment of the antidumping duty." *Torrington*, 20 CIT at ____, 944 F. Supp. at 933; *see also Torrington Co. v. United States*, 19 CIT ____, ____, 881 F. Supp. 622, 631 (1995); *Outokumpu Copper Rolled Prods. AB v. United States*, 17 CIT 848, 863, 829 F. Supp. 1371, 1383 (1993). Commerce's decision to apply the same standard in ESP situations is consistent with the Court's prior opinions addressing Torrington's objections to Commerce's practice in purchase price situations.

Regarding Torrington's request to require Commerce to apply the regulation based on existing evidence, or to reopen the investigation in light of Commerce's newly articulated policy of applying the reimbursement regulation in ESP situations, the Court finds such actions unne-

cessary. First, as the Court already determined in *Torrington*, 20 CIT at ____, 944 F. Supp. at 934, there is no record evidence of reimbursement. Second, Torrington had ample opportunity during the administrative review to submit evidence addressing the issue of reimbursement. In fact, Torrington admits that it submitted evidence relating to the application of the reimbursement regulation, but contends that such arguments were "logically presented on a hypothetical basis only." *Torrington's Comments* at 4. Torrington fails to convince the Court that there is any new evidence that would provide a basis for the application of the reimbursement regulation to SKF. Torrington's own statements lead the Court to believe that any evidence Torrington wishes to present already exists in the administrative record. Commerce's newly articulated position does not change the fact that there was insufficient evidence to support an application of the reimbursement regulation to SKF. Accordingly, the Court sustains Commerce on this issue.

2. *Other Issues:*

Pursuant to this Court's order, Commerce applied a tax-neutral methodology for adjusting for value-added taxes. *Remand Results* at 9–10. Commerce also corrected a clerical error affecting the calculation of SKF's U.S. price. *Id.* at 10–11. Finally, Commerce corrected an inadvertent error identified by Torrington. *Id.* at 11. The Court finds all of the above actions to be in accordance with the Court's remand order in *Torrington* and consistent with law. Therefore, the Court affirms Commerce's Remand Results.

CONCLUSION

In accordance with the foregoing opinion, the Court finds that Commerce's Remand Results are consistent with law and supported by substantial evidence on the record. Consequently, Commerce's Remand Results are affirmed and this case is dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/68 7/24/97 Newman, J.	Capcom U.S.A., Inc.	95–04–00507	9504.30.00 3.9%	Mask ROM; PAL 8542.11.80 Free G-Board with spacer or A-Board 9504.30.00 3.9% Game Label 4911.91.20 $0.132/kg Security Label 3919.90.50 5.8% ROM Label 8310.00.00 3.8% Steel Hex Nut 7318.15.20 0.7%	Agreed statement of facts	San Francisco Parts and accessories which constitute retrofitting kits for arcade-type coin-operated computer game machines

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